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EDITOR'S NOTE

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pril 9, 1985

Title: Terrance Holbrook, Superinterdent, Massachusetts Correctional Institution, Norfolk, Massachusetts, et al., Petitioners
v.
Charles Flynn

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Dickinson,Thomas More

Counsel for respondent: Kanner,George

ntry	Date	Note	Proceedings and Orders
1	Apr 9 1985	G	Petition for writ of certiorari filed.
2	Feb 23 1985		Application for stay (A-652) and order denying same byBrennan, J., on 2/26/85
4	May 9 1985		Order extending time to file response to petition until May 24, 1985.
5	May 24 1985		Brief of respondent Charles Flynn in opposition filed.
6	May 24 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Jun 4 1985		DISTRIBUTED. June 20, 1985
8	Jun 8 1985	X	Brief amicus curiae of Indiana, et al. filed.
9	Jun 24 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Jun 24 1985		Petition GRANTED.
			**********
12	Jul 19 1985		Order extending time to file brief of petitioner on the merits until August 22, 1985.
13	Aug 22 1985		Brief amicus curiae of California filed.
14	Aug 22 1985		Brief of petitioners Holbrook, Supt., MA Corr., et al. filed.
16	Sep 16 1985		Order extending time to file brief of respondent on the merits until November 1, 1985.
17	Oct 15 1985		Order further extending time to file brief of respondent on the merits until November 22, 1985.
18	Oct 23 1985		Record filed.
19	Oct 23 1985		Certified original record, 2 boxes, received. Box # 1 received Oct. 23, 1985. Box # 2 received Oct. 21, 1985.
20	Nov 21 1985		SET FOR ARGUMENT, Tuesday, January 14, 1986. (4th case).
21	Nov 26 1985		CIRCULATED.
22	Dec 3 1985		Application for leave to file respondent's brief on the merits in excess of the page limitation filed (A-435),
23	Dec 3 1985		and order granting same by Brennan, J., on December 4, 1985. The brief may not exceed 55 pages.
24	Dec 4 1985	X	Brief of respondent Charles Flynn filed.
25	Jan 3 1986	X	Joint appendix filed.
26	Jan 14 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-1606

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1984

TERRANCE HOLBROOK AND JOHN MORAN,
PETITIONERS,

v.

CHARLES FLYNN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

Question Presented

Did the United States Court of Appeals for the First Circuit, in reviewing a petition for writ of habeas corpus, err in disregarding state court factual determinations and in holding that the presence of four uniformed policemen, wearing holstered pistols, in the spectator section of the courtroom during the trial of the respondent and five co-defendants, denied the respondent his constitutional right to a fair trial?

Parties

The petitioners are Terrance Holbrook, the superintendent of the Massachusetts Correctional Institution in Norfolk, Massachusetts, and John Moran, director of the Rhode Island Department of Corrections. Petitioners have joint custody over the respondent, Charles Flynn, who, at the time of the judgment below by the First Circuit Court of Appeals, was serving concurrent sentences in Massachusetts for criminal convictions in Massachusetts and Rhode Island.

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Citations to Opinions Below

A copy of the opinion of the United States Court of Appeals for the First Circuit which granted the respondent's petition for a writ of habeas corpus is annexed as Appendix A. That opinion has been published *sub nom. Flynn* v. *Holbrook*, 749 F.2d 961 (1st Cir. 1984) (hereinafter "*Flynn*"). A copy of the opinion of the United States District Court for the District of Rhode Island which denied respondent's petition for a writ of habeas corpus is annexed as Appendix B. That opinion has been published *sub nom. Flynn* v. *Holbrook*, 581 F. Supp. 990 (D.R.I. 1984). A copy of the opinion of the Rhode Island Supreme Court denying respondent's direct appeal of his conviction in state court is annexed as Appendix C. That opinion has been published *sub nom. State* v. *Byrnes*, __ R.I. __, 433 A.2d 658 (1981).

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit granting the petition for a writ of habeas corpus was entered on December 7, 1984. A copy of that judgment is annexed as Appendix D. Petitioners timely filed a petition for rehearing *en banc*. That petition was denied in an order entered on January 11, 1985. A copy of that order is annexed as Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).[1]

Constitutional Provisions Involved

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Rights of accused in criminal prosecutions. — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Citizenship — Privileges and immunities — Due process — Equal protection of laws. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or

[1] The history of this case in the court of appeals was described in detail in petitioners' application for stay denied by Justice Brennan on February 26, 1985. *See Holbrook* v. *Flynn*, A-652.

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Statutes Involved

28 U.S.C. §2245 and§2254(b), (c) and (d) (The texts of the statutes are annexed as Appendix H).

Statement of the Case

The criminal charges against the respondent arose out of one of Rhode Island's most notorious and highly publicized criminal episodes, the armed robbery of a commercial safe deposit company called the Bonded Vault Company. The incident, known as the "Bonded Vault" holdup, occurred on the morning of August 14, 1975, when a group of eight men entered the Providence, Rhode Island, premises of the Bonded Vault Company. The men robbed at gunpoint several Bonded Vault employees and forcibly opened 146 of the 148 safe deposit boxes located in the vault. A customer and employees who were on the premises were herded and locked into a men's room. The robbers took with them millions of dollars worth of currency, jewelry, and other valuables which had been stored in the vault's boxes. *State* v. *Byrnes*, __ R.I. at __, 433 A.2d at 661-662, Appendix at C-1.

On January 7, 1976, the respondent and eight others were indicted by a Providence County, Rhode Island, Grand Jury (Indictment No. 76-53). That indictment charged the respondent, *inter alia*, with robbery, kidnapping, conspiracy, assault with a dangerous weapon, and several other crimes.[2]

[2] Indictment No. 76-53 also charged the respondent with entering into a building with intent to rob, possession of burglary tools, unlawful possession of firearms, unlawful possession of pistols, while committing a crime of violence, and with conspiracy.

On April 12, 1976, jury selection in respondent's trial began before the trial judge, Rhode Island Superior Court Judge Anthony A. Giannini. On that day, respondent's trial counsel, who also represented two other co-defendants, requested that Judge Giannini exclude from the courtroom four uniformed Rhode Island state troopers, who were wearing holstered pistols and were seated in the spectator section of the courtroom. Judge Giannini denied the request, but invited counsel for the defendants to question prospective jurors, as the judge did himself, regarding the prejudicial impact, if any, that the troopers' presence might have.[3]

The defendants then filed a petition for writ of certiorari to the Rhode Island Supreme Court requesting review of Judge Giannini's action. On April 27, 1976, the Rhode Island Supreme Court issued the writ and ordered Judge Giannini make a personal determination as to the need for state troopers' presence after considering "all relevant factors." *State* v. *Byrnes*, 116 R.I. 925, 927, 356 A.2d 448, 449 (1976) (hereinafter "*Byrnes I*"). (The *Byrnes I* order is annexed as Appendix F.)

Following a hearing, Judge Giannini denied the defendants' motion to exclude the troopers from the courtroom.[4] The

[3] During the jury selection process, all prospective jurors who were not disqualified or removed from the jury panel were asked whether the presence of the troopers created an inference of guilt. Of the fifty-four prospective jurors who were asked about the troopers' presence, fifty-one said that the troopers' presence created no inference of guilt. *State* v. *Byrnes*, __ R.I. at __, 433 A. 2d at 663, Appendix at C-4. The other three did not answer the inquiry directly, but two stated that they became "nervous" upon seeing the uniformed troopers. *Id.* None of these three jurors served on the final jury panel.

When the prospective jurors were asked if they had any idea why the troopers were in court, the answers ranged from "didn't know" to "security" to "protection." Those who chose "protection" indicated that the protection was for everyone's, including the defendants'. *Id.* The number of troopers present in the courtroom throughout the pre-trial and trial proceedings fluctuated between three and four.

[4] The details of that hearing are set forth in the Rhode Island Supreme Court opinion denying the respondent's appeal of his conviction. *State* v. *Byrnes*, __ R.I. at __, 433 A.2d at 662-663, Appendix at C-3 through C-5.

troopers remained in the front row of the spectator section on each day of the trial including those days when all the defendants, as part of their strategy, chose to be absent from the courtroom.

After a four month trial, the respondent and two co-defendants were convicted of various charges while three other co-defendants were acquitted.[5]

The respondent and his two co-defendants appealed their convictions to the Rhode Island Supreme Court raising, *inter alia*, the issue as to the presence of the state troopers in the courtroom during the trial. The Rhode Island high court affirmed the judgments of convictions noting that the trial justice, in denying the motion to exclude the uniformed troopers from the courtroom, concluded that " 'especially with respect to the jurors we have in this box,' "[6] the troopers' presence had " 'no effect whatsoever upon the constitutional rights of these defendants.' " *State* v. *Byrnes*, __ R.I. at __, 433 A.2d at 663, Appendix at C-5, quoting the trial justice. The Rhode Island Supreme Court found that Judge Giannini had considered "all relevant factors" and had not abused his discretion in finding that the defendants had not been prejudiced by the presence of the troopers. *Id.*

[5] Jury selection began on April 12, 1976, and concluded on May 26, 1976; on the latter date the presentation of evidence commenced and verdicts were returned on August 12, 1976. Of the nine persons indicted, two were fugitives at the time of trial, and one was called as a witness for the state and was not tried. Of the remaining six, the respondent, and two others, Ralph Byrnes and John Ouimette, were convicted. The three other co-defendants were acquitted. The respondent was convicted on four counts of robbery, five counts of kidnapping, one count each of entering into a building with intent to rob, possession of burglary tools, possession of a pistol while committing a crime of violence, conspiracy, unlawful possession of firearms, and assault with a dangerous weapon. *State* v. *Byrnes*, __ R.I. at __, 433 A.2d at 661-662, Appendix at C-2.

[6] The trial justice was referring to the fact that each of the jurors serving on the final jury panel, after being questioned before trial, stated that the presence of the troopers created no inference of guilt with respect to the defendants. *See* note 3, *supra*.

On June 10, 1983, respondent filed a petition for a writ of habeas corpus alleging, *inter alia*, that his constitutional right to a fair trial was violated by the presence of the state troopers at trial. The habeas corpus petition was denied in an order and opinion dated February 24, 1984, by United States District Judge Bruce Selya. *Flynn* v. *Holbrook*, 581 F. Supp. 990.

Respondent filed a notice of appeal from the district court's order denying his petition on March 16, 1984, and a certificate of probable cause was granted by the district court on March 26, 1984.

Respondent raised four separate constitutional arguments before the United States Court of Appeals for the First Circuit. That court rejected three of those arguments but reversed the district court's denial of the petition for a writ of habeas corpus on the sole ground that the presence of the state troopers detracted from the presumption of innocence to which respondent was entitled and resulted in a violation of his right to a fair trial. The court of appeals expressly acknowledged that the trial was without other prejudicial error. *Flynn*, 749 F.2d at 963, Appendix at A-4. The petitioners timely filed a petition for rehearing *en banc* which was denied by the court of appeals in an order entered on January 11, 1985.

The sole issue in this case is whether or not the court of appeals erred in ruling that respondent was denied his right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

How the Federal Question Was Raised and Decided Below

The respondent did not explicitly raise the constitutional fair trial issue in his appeal to the Rhode Island Supreme Court.[7] Thus, while that court upheld the respondent's conviction it did not explicitly address the respondent's present claim that his constitutional right to a fair trial was violated. *See State* v. *Byrnes*, __ R.I. at __, 433 A.2d at 662-663, Appendix at C-2 through C-5. The respondent filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. The petition was transferred to the District of Rhode Island and was denied. In denying the respondent's petition, the district court judge rejected the respondent's argument—explicitly raised this time—that his

[7] The respondent explicitly raised the constitutional fair trial issue in the trial court. On direct appeal of his conviction to the Rhode Island Supreme Court, however, the respondent framed his argument in state law terms—namely that the trial justice had erred in allowing the troopers to be present. The respondent in his brief to the Rhode Island Supreme Court did not base his argument on any case from this court and did not explicitly argue that any specific federal constitutional right or provision was violated by the troopers' presence at trial. (The pertinent section of respondent's brief to the Rhode Island Supreme Court is annexed as Appendix I).

Accordingly, the Rhode Island Supreme Court did not analyze or mention the Sixth or Fourteenth Amendments in addressing respondent's argument on appeal. The court, in reviewing the decision of the trial justice, noted that the trial justice "addressed the issue of whether the presence of the troopers actually posed a threat to the defendants' right to a fair trial," and also noted that the trial justice had ruled that the presence of the armed, uniformed troopers in the courtroom had " 'no effect whatsoever upon the constitutional rights of these defendants.' " *State* v. *Byrnes*, __ R.I. at __, 433 A.2d at 663, Appendix at C-5, quoting the trial justice. The actual holding of the Rhode Island court, however, was framed—in response to the respondent's argument—in state law terms. Thus, the court held that the trial justice did not abuse his discretion in permitting the troopers to be present. *Id.* The federal district court observed that the respondent, in his habeas petition, had "dressed in constitutional garb" the arguments he unsuccessfully made to the Rhode Island Supreme Court, *Flynn*, 581 F. Supp. at 992, Appendix at B-2, but held that respondent's constitutional claims were fairly presented to the Rhode Island Court, *id.* at 999, n. 11, Appendix at B-14.

A majority of this Court might find that under these circumstances the respondent did not exhaust his available state court remedies because he did not fairly present the substance of his federal habeas corpus claim to the Rhode Island court. *See Anderson* v. *Harless*, 459 U.S. 4, 6-7 (1982) (*per curiam*). In the event that this Court determines that the respondent did not fairly present his constitutional claim to the Rhode Island Supreme Court, the respondent should be deemed to have failed to exhaust his available state court remedies as required by 28 U.S.C. §§2254(b) and (c), the petition for certiorari should be granted on that ground, and the case should be remanded for further proceedings consistent with this court's direction. *See Anderson* v. *Harless*, 459 U.S. at 8; *Rose* v. *Lundy*, 455 U.S. 509 (1982).

constitutional right to a fair trial had been violated by the presence of the state troopers. *Flynn* v. *Holbrook*, 581 F. Supp. at 997-998, Appendix at B-12 and B-13. The respondent renewed his assertion that he had been denied his constitutional right to a fair trial on appeal to the First Circuit Court of Appeals. That court did not directly address the specific constitutional provisions underlying the respondent's claim, but held that the presence of the troopers had violated the constitutional presumption of innocence to which respondent was entitled.

Reasons for Granting the Writ

Introduction

The First Circuit Court of Appeals, in its opinion below has staked out new constitutional territory—territory into which, until now, no appellate court has ever ventured. Before the *Flynn* opinion, no appellate court appears to ever have held that the mere presence at trial of several armed, uniformed police officers in the public spectator section of a courtroom, by itself, results in the violation of a defendant's constitutional right to a fair trial. To the contrary, there is an unbroken line of authority—consisting of both state and federal court decisions—which holds that the mere presence of several armed or uniformed guards in a courtroom, without more, does not violate a defendant's right to a fair trial.[8]

[8] It is well established that the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *E.g.*, *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976). This court does not appear to have addressed the question as to whether the presence of several armed guards in the courtroom interferes with that right. Other courts which have considered the constitutional issue posed by the presence of guards in the courtroom have done so either in light of the fair trial guarantee of the due process clause of the Fourteenth Amendment, *see, e.g.*, *Kennedy* v. *Cardwell*, 487 F.2d 101, 104, 108 (6th Cir. 1973), *cert. denied* 416 U.S. 959 (1974), or in light of the Sixth Amendment's guaranty that a defendant be tried by an impartial jury, *see, e.g.*, *Birt* v. *Montgomery*, 709 F.2d 690, 702 (11th Cir. 1983) (*rehearing en banc*).

The court of appeals was unable in *Flynn* to cite a single case holding that the presence of armed guards in the courtroom violated a defendant's right to a fair trial. The only Supreme Court cases it cited in *Flynn* were *Estelle* v. *Williams*, 425 U.S. 501 (1976) and *Illinois* v. *Allen*, 397 U.S. 337 (1970). Neither of those cases, however, dictate or even foreshadow the result in *Flynn* since neither case addresses the issue of the presence of armed guards in the courtroom—*Estelle* teaching that compelling a defendant to wear prison garb would be unconstitutional, and *Allen* stating that the use of physical restraints such as shackles or gagging the defendant could be unconstitutional.

The court of appeals' unprecedented ruling in *Flynn* has created a conflict between the First Circuit and at least two other federal circuit courts of appeals and has also created a direct conflict between the First Circuit and the Rhode Island Supreme Court. In addition, the *Flynn* opinion contravenes an established line of authority and represents an unwarranted expansion of the constitutional requirements for a fair trail as articulated by this court in *Estelle* and *Allen*.

Perhaps more important, the court of appeals' decision in *Flynn* does violence to state and federal comity by failing to accord the presumption of correctness due a state court's factual findings under 28 U.S.C. §2254(d). Here, at the trial, the trial judge conducted an extensive *voir dire* of the jury panel regarding the presence of the troopers. Based on that *voir dire*, the trial justice concluded that none of the individual jurors seated on the final panel were influenced by the presence of the troopers. The trial justice's conclusion, based on the individual questioning of each juror, was one of historical fact and, hence, entitled to the presumption of correctness under 28 U.S.C. §2254(d).

The court of appeals in *Flynn* disregarded this presumption of correctness and, instead, effectively reversed the burden of proof in a habeas corpus proceeding by finding, *sua sponte*,

facts regarding the duties and location of the troopers at trial that not only were nowhere to be found in the record, but were also plainly wrong.

Finally, petitioners submit that the court of appeals erroneously applied the harmless error doctrine and erred in refusing to allow the trial judge, as other courts have done in similar circumstances, to supplement the record by stating all the reasons he relied on in determining that the presence of the troopers was necessary.

For these reasons and because of the compelling public importance underlying the issues of the presence at trial of uniformed, armed policemen—particularily at trials involving highly publicized crimes or crimes of violence—petitioners respectfully submit that this court should grant certiorari to review the court of appeals' decision in *Flynn*.

I. The Decision of the United States Court of Appeals for the First Circuit Should Be Reviewed Because (A) It Conflicts With Prior Decisions by the United States Courts of Appeals for the Second and District of Columbia Circuits and (B) It Contravenes an Established Line of Authority and Constitutes an Unwarranted Expansion of Decisions of This Court.

(A)

Review by this court, by certiorari, is appropriate when a federal court of appeals has rendered a decision in conflict with another federal court of appeals on the same matter. U.S. Sup. Ct. R. 17.1(a); *see, e.g., Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 559 (1968); *Northeastern National Bank* v. *United States*, 387 U.S. 213, 217 (1967).

The court of appeals' opinion in *Flynn* held that the presence outside the bar of four uniformed, armed troopers in

the first row of the spectator section of the courtroom[9] was analogous to cases in which defendants were physically restrained without justification, was antithetical to the presumption of respondent's innocence and was inherently prejudicial—despite the fact that the trial was, in the words of the court of appeals, "without any other prejudicial error. *Flynn*, 749 F.2d at 963, Appendix at A-4. That holding conflicts with the Second Circuit Court of Appeals decision in *Hardee* v. *Kuhlman*, 581 F.2d 330, 331-332 (2nd Cir. 1978) and with the District of Columbia Circuit Court of Appeals decision in *Dorman* v. *United States*, 435 F.2d 385, 397-398 (D.C. Cir. 1970) (*en banc*).

In *Hardee* the defendant, ultimately convicted of manslaughter, objected, before and during the trial, to the presence of armed, uniformed guards in the courtroom and requested that the guards sit in the back of the courtroom or wear civilian clothes. *Hardee*, 581 F.2d at 331. Despite the defendant's request, the trial judge allowed three armed guards to be present in the courtroom, one seated three feet behind the defendant, one stationed at the jury box, and the other at the courtroom entrance. *Id.*

After the defendant's conviction was affirmed by New York state courts,[10] he brought a petition for habeus corpus relief in

[9] The trial transcript establishes that the troopers sat outside the bar in the front row of the spectator section of the courtroom. The transcript does not indicate the precise locations of the troopers or the distances between the troopers and the respective defendants. The respondent introduced no evidence of these locations or distances in the habeus proceeding below. To the extent that the record below is inadequate in this regard, petitioners submit, as argued *infra*, that this petition should be granted and the holding below reversed because the respondent failed to meet his burden of proof in a habeus corpus proceeding since he did not establish the factual predicates for showing that any constitutional right of his was violated.

[10] A New York intermediate appellate court affirmed the defendant's conviction in *People* v. *Hardee*, 55 A.D. 2d 858, 390 N.Y. 2d 768 and the New York Court of Appeals denied the defendant leave to appeal. 41 N.Y. 2d 866, 393 N.Y.S. 2d 1033, 362 N.E. 2d 631. This Court denied his petition for a writ of certiorari *sub nom Hardee* v. *New York*, 431 U.S. 958 (1977).

federal district court. The defendant argued, as the respondent did here in *Flynn*, that the presence of the guards adversely affected the presumption of his innocence and impermissibly created in the jurors the belief that he was a dangerous person. *Hardee*, 581 F.2d at 331. The Second Circuit affirmed the district court's denial of the defendant's habeus corpus petition. It observed that the mere fact of guarding a defendant has never been treated as a *per se* constitutional violation. *Id.* at 332, n. 2.

The Second Circuit rejected the defendant's constitutional challenge relying on the facts that the defendant had been charged with murder, was properly in custody because he had been unable to post bail, was not subject to any visible signs of restraint, was not impeded from communicating with his counsel by the stationing of a guard three feet behind him, and because the "jury must have known that the presence of the police officers in the courtroom was normal expectancy." *Id.* at 332. Under these circumstances the Second Circuit rejected the defendant's attempt to analogize his situation to the entirely different circumstances in cases dealing with defendants who were shackled or clad in prison garb. *Id.*

Thus, the conflict between the Courts of Appeals for the First and Second Circuits is clear. The Second Circuit found the mere presence of a few armed, uniformed guards not to be inherently prejudicial and rejected the analogy to cases in which defendants were shackled or forced to wear prison garb. The court of appeals in *Flynn* on the other hand declared the *Hardee* decision to be unpersuasive, found the analogy to cases involving prison garb and shackling to be apt, and held the mere presence of the armed guards to be constitutionally impermissible.

There is a similar conflict between the *Flynn* opinion and that of the District of Columbia Court of Appeals in *Dorman* v. *United States*. In *Dorman* after the first day of trial, the judge revoked the bail of each of two defendants and ordered a

Deputy United States Marshal to sit behind each of the defendants at counsel table. *Dorman*, 435 F.2d at 397. The judge apparently revoked the defendants' bail because they made a late appearance for the start of the trial and because of the "menacing manner" demonstrated by the defendants towards government witnesses. *Id.* The trial judge, however, gave no reason for placing the marshals next to the defendants.

After their convictions for armed robbery, the defendants on appeal argued that the placement of the marshals prejudiced them in the eyes of the jury. In a portion of the opinion written by Justice J. Skelly Wright, the court noted that the trial judge might have taken measures to minimize the impact on the jury of the fact that the defendants had been suddenly placed in custody. *Id.* The court noted that there "seems to be no clear reason why marshals had to be stationed right next to the defendants." *Id.* The court further noted that the trial judge "should shackle the defendants in court whether with chains or with marshals, only on a clear showing that the defendants pose an immediate threat to the peace and order of the trial." *Id.* at 398.

Nonetheless, the court refused to assume that the placement of the marshals inevitably resulted in prejudice to the defendants by violating their right to a fair and impartial trial. Thus, the court held:

> "We have examined the trial transcript and we find that the judge conducted an otherwise fair and impartial trial. We will not assume, on this record, that the revocation of bail or the placement of marshals illegally prejudiced the defendants." *Id.* at 398.

It is clear that the court in *Dorman*, as did the court in *Flynn*, found no satisfactory reason on the record to explain the trial judge's decision to allow the placement of uniformed guards near the defendants. The court in *Flynn*, however,

concluded that the presence of the troopers was inherently prejudicial despite the fact that no other prejudicial error was committed during the trial, and despite the fact that three of the respondent's co-defendants were acquitted.[11] The court in *Dorman*, on the other hand, refused to assume that the placement of uniformed marshals—which was closer to the defendants than the placement of troopers in *Flynn*—was prejudicial in light of the fact that the trial judge conducted an otherwise fair and impartial trial.

Thus, it is submitted, there is a clear conflict between the Courts of Appeals for the First Circuit on the one hand and the Second and District of Columbia Circuits on the other, with respect to whether or not the mere presence of uniformed guards near a defendant at trial results in a constitutional violation of the defendant's right to a fair and impartial trial.[12] Petitioners respectfully request that this court resolve this conflict between the circuits by granting their petition for a writ of certiorari.

(B)

This Court has often granted certiorari where the decision below is, or appears to be, out of line with the authorities. *See, e.g., Braen* v. *Pfeifer Transportation Company*, 361 U.S. 129, 130 (1959). The court of appeal's *Flynn* opinion is such a decision.

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[11] Nowhere does the court of appeals in *Flynn* articulate what factor or combination of factors—the troopers' uniforms, their weapons, their seating arrangement, or their mere presence—were conclusive in its determination that the respondent's right to a fair trial was violated.

[12] The conflict created by the court of appeals'opinion in *Flynn* is even sharper when one considers that in *Flynn* the troopers were all seated outside the bar in the spectator section of the courtroom whereas in both *Hardee* and *Dorman* the uniformed guards were stationed inside the bar and virtually next to the defendants. *See also, United States* v. *Greenwall*, 418 F.2d 847 (4th Cir. 1969)(*per curiam*)(two or three uniformed correctional officers present in the courtroom; at least one seated inside the bar of the court behind defendants; court held since defendants were not on bail, were serving sentences for other convictions, and were being tried for escape, no abuse of discretion existed on the part of the trial judge in permitting the uniformed officers to be present).

The *Flynn* opinion is an interesting exercise in judicial sophistry. To read the opinion, one would conclude that it was the federal district court rather than the court of appeals that was out of line with the case law. For example, the court of appeals stated:

> "Even if, instead of falling far short, the facts had been as the [district] court stated, the law as demonstrated by five of the six cases cited in its opinion would not have supported its results." *Flynn*, 749 F.2d at 964, Appendix at A-6.

What the court of appeals failed to emphasize was that in each of the six cases cited by the district court, the presence of guards in the courtroom during a trial was upheld against a constitutional challenge, albeit under varying sets of facts. One of those six cases, *Hardee* v. *Kuhlman*, flatly contradicted the result in *Flynn*. The court of appeals—which was unable to cite a single case in which the presence of uniformed or armed guards was found to violate a defendant's right to a fair trial—paid scant attention to *Hardee* summarily dismissing that decision as "singularly unpersuasive." *Flynn*, 749 F.2d at 964, Appendix at A-8. The *Hardee* decision may have been unpersuasive to the court of appeals, but it was most assuredly not singular.

In fact, there was—until the *Flynn* opinion—an unbroken line of authority, consisting of both state and federal cases, which held that the mere presence of several armed or uniformed guards in a courtroom during a defendant's trial, without more, did not violate the defendant's right to a fair trial or constitute reversible error. *See, e.g., Hardee* v. *Kuhlman*, 581 F.2d at 331-332; *Dorman* v. *United States*, 435 F.2d at 397-398; *Dunn* v. *State*, 653 P.2d 1071, 1084-1086 (Alaska App. 1982)(mere presence of uniformed officers wearing service revolvers in neutral area of courtroom, without any

overt manifestation of actual physical restraint or custody, insufficient to deprive defendant of right to fair trial); *Thomae* v. *State*, 632 P.2d 236, 241-242 (Alaska App. 1981)(to same effect); *People* v. *Duran*, 16 Cal.3d 282, 291 n. 8, 545 P.2d 1322, 1327 n. 8, 127 Cal. Rptr. 618, 623 n. 8 (1976) *(en banc)* (while defendant cannot be subjected to physical restraints of any kind in jury's presence absent showing of manifest need for such restraints, armed guards, unless they are present in unreasonable numbers, need not be justified by the court or prosecutor); *People* v. *David*, 12 Cal.2d 639, 644, 86 P.2d 811, 813 (1939)(deputy sheriff seated inside bar immediately behind defendant held not to be prejudicial); *People* v. *Harris*, 98 Cal. App. 2d 662, 664-665, 220 P.2d 812, 814 (1950)(armed guard permitted to remain in courtroom held not to be prejudicial); *Zant* v. *Gaddis*, 247 Ga. 717, 718, 279 S.E.2d 219, 221 (1981), *cert. denied*, 454 U.S. 1037 (1981) (small number of uniformed officers inside courtroom, some of whom were armed, held not to constitute excessive number of guards prejudicing defendant's right to fair trail); *State* v. *Daniels*, 347 S.W.2d 874, 876 (Mo. 1961)(deputy sheriff assigned to keep defendant under guard wore firearm while guarding defendant during trial; this circumstance, standing alone, held insufficient to constitute reversible error); *see also*, *United States* v. *Greenwall*, 418 F.2d at 847; *People* v. *Ray*, 252 Cal. App. 2d 932, 973, 61 Cal. Rptr. 1, 26-27 (Cal. App. 1967)(mere presence of police officer obviously charged with responsibility of custody of defendant not considered prejudicial); *People* v. *Stabler*, 202 Cal. App. 2d 862, 863-864, 21 Cal. Rptr. 120, 121 (Cal. App. 1962)(no due process violation resulted from mere presence of armed guards in courtroom when necessary to insure orderly trial when defendant was charged with attempted escape); *Green* v. *State*, 246 Ga. 598, 600, 272 S.E. 2d 475, 480-481, *cert. denied*, 450 U.S. 936, *reh. denied*, 451 U.S. 933 (1980)(trial justice's allowance of five armed deputies to be present in courtroom during trial held not to be abuse of

discretion in light of defendant's prior conviction and record of escape); *Glidewell* v. *State*, 169 Ga. App. 858, 858-859, 314 S.E. 2d 924, 926 (Ga. App. 1984) (armed guards in attendance at armed robbery trial held not to constitute abuse of discretion); *Pedigo* v. *Commonwealth*, 644 S.W. 2d 355, 357 (Ky. App. 1982)(no prejudice from alleged overabundance of uniformed law officers in courtroom in view of defendant's prior conviction); *State* v. *Peacher*, 280 S.E. 2d 559, 572, 573 n. 6 (W.Va. 1981)(court noted that no other court had ever found the presence of security forces in courtroom during a trial to be prejudicial *per se* and that the close proximity of guards had not generally been found to be a basis, by itself, for requiring reversal of a conviction).

Not only is the court of appeals decision in *Flynn* out of line with these authorities, but it also represents an unprecedented and unwarranted expansion of constitutional doctrine established by decisions of this Court. The two cases from this Court cited by the court of appeals in *Flynn* were *Estelle* v. *Williams* and *Illinois* v. *Allen*. Neither of these cases can bear the constitutional weight that the court of appeals in *Flynn* placed on them.

In *Allen* this Court declined to hold that the Sixth Amendment granted a defendant an absolute right to be present at his own trial no matter how unruly or disruptive his conduct might be. 397 U.S. at 342. The Court upheld the defendant's conviction finding that the trial judge properly had the defendant removed from the courtroom because of the defendant's abusive and disruptive behavior. *Id.* at 345-346.

In *Estelle* this Court stated that a defendant could not be compelled to stand trial before a jury while dressed in identifiable prison clothes. 425 U.S. at 512-513. The Court, however, refused to adopt a *per se* rule requiring reversal whenever a defendant was tried in prison garb. The actual holding in the case affirmed that defendant's conviction since, in this Court's view, the defendant failed to raise objection at trial to being tried in prison clothes. *Id.*

In both these cases this Court considered, but refused, to adopt a rule which would have declared the challenged practices to be prejudicial *per se* to a defendant's right to a fair trial. The court of appeals in *Flynn*, however, has effectively adopted such a *per se* rule with respect to what the *Flynn* court viewed as the unexplained presence of uniformed, armed guards in the courtroom. Petitioners submit that in so doing the court of appeals in *Flynn* either mistakenly relied on this Court's decisions in *Estelle* and *Allen* or significantly expanded the constitutional scope of those decisions without any indication from this Court that it would sanction or endorse such an expansion.

For these reasons, because court of appeals *Flynn* decision is clearly out of line with the authorities and represents an unwarranted and unprecedented expansion of decisions by this court, petitioners respectfully request that this Court grant their petition for a writ of certiorari.

II. The United States Court of Appeals for the First Circuit Erred in (A) Failing To Accord a Presumption of Correctness to State Court Factual Findings in a Habeas Corpus Proceeding and Misapplying the Harmless Error Doctrine; (B) Shifting the Burden of Proof in a Habeas Corpus Proceeding by Making Factual Findings Which Are Not Derived From the Record and Are Plainly Wrong; and (C) Refusing To Remand the Case So That the Trial Judge Could State All of the Reasons He Relied on in Determining That the Troopers' Presence Was Necessary.

(A)

Petitioners submit that the court of appeals' decision in *Flynn* displays a disturbing disregard for the principle of state and federal comity carefully woven into the habeas corpus

statute because the decision fails to accord that presumption of correctness due a state court's factual findings under 28 U.S.C. §2254(d). Here, the trial judge conducted a *voir dire* of individual prospective jurors regarding the troopers presence. *See* note 3, *supra*. He concluded based on this *voir dire* that "...none of the persons who were examined created any inference of guilt in their mind with respect to these defendants," (Appendix at G-1), and that " '...with respect to the jurors we have in this box [referring to the final jury panel],' " the troopers' presence had " 'no effect upon the constitutional rights of these defendants.' " *State* v. *Byrnes*, 433 A.2d at 663, Appendix at C-5.

Petitioners submit that the effect of the troopers' presence on the impartiality of the individual jurors, in light of the location and duties of the troopers, and in light of the trial judge's *voir dire* of the individual jurors, was, as this Court has recently implied, a question of "historical fact." *See Patton* v. *Yount*, __U.S. __, 104 S.Ct. 2885, 2891 (1984); *Rushen* v. *Spain*, __U.S. __, 104 S.Ct. 453, 456 (1983) *(per curiam)*. The trial judge's resolution of that historical factual question, which was affirmed by the Rhode Island Supreme Court was a finding entitled to a presumption of correctness under 28 U.S.C. §2245(d). *See Patton* v. *Yount* and *Rushen* v. *Spain*.

The state trial court was obviously in a far better position than any appellate court, state or federal, to judge the impact of the troopers' presence on the jury in light of the layout of the courtroom, the distances between the troopers and the respective defendants, and the demeanor and reactions of the individual jurors during the *voir dire*. This court has observed that there are compelling reasons to apply the statutory presumption of correctness under 28 U.S.C. §2254(d) to a trial judge's determination that the impartiality of individual jurors has not been affected:

> "First, the determination has been made only after an extended *voir dire* proceeding designed specifically to identify biased venire men. It is fair to assume that the method we have relied on since the beginning. . . usually identifies bias. Second, the determination is essentially one of credibility, and therefore one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.' . . . the respect paid such findings in a habeas proceeding certainly should be no less. . . ." [Citations omitted]. *Patton* v. *Yount*, __U.S. at____, 104 S.Ct. at 2892.

Furthermore, the Rhode Island Supreme Court, based largely on the trial judge's *voir dire* of the jurors and the absence of any prejudice shown by the respondent, upheld the trial judge's conclusion and found implicitly that the jury's deliberations were not biased. This court has expressly held, with respect to such a finding about a jury that:

> "This finding of 'fact'—on a question the state courts were in a far better position than the federal courts to answer—deserves a 'high measure of deference,' *Sumner* v. *Matta*, 455 U.S. 591, 598, 102 S.Ct. 1303, 1307, 71 L.ed. 2d 480 (1982), and may be set aside only if it 'lack[s] even "fair support" in the record.' *Marshall* v. *Lonberger*, *supra*, __ U.S., at ____, 103, S.Ct. at 850." *Rushen* v. *Spain*, 104 S.Ct. at 456-457.

Accordingly, the Rhode Island trial court's determination that the impartiality of the individual jurors had not been affected by the troopers' presence and the Rhode Island Supreme Court's determination, in essence, that the jury's deliberations were not tainted by the troopers' presence, were findings of fact which the court of appeals could set aside

only if those findings lacked fair support in the record. *See*, *e.g.*, *Rushen* v. *Spain*, __ U.S. at __, 104, S.Ct. at 456-457; 28 U.S.C. §2254(d)(8). Neither the court of appeals nor the respondent, however, point to any way in which those findings lack fair support in the record.

To the contrary, the record provides ample support for the Rhode Island state trial and appellate courts' factual findings regarding juror impartiality. Hence, the record indicates that at the respondent's trial, the state troopers were seated in the spectator section of the courtroom, that they did not surround, guard, or sit next to the defendants, and that they were present in court even on those days when the defendants were absent—a fact specifically noted by a prospective juror (Appendix G). Moreover, three of respondent's co-defendants were acquitted, a fact which suggests that the jury decided the case solely on the strength of the evidence adduced at trial. The record also contains the jurors' own *voir dire* expressions of impartiality. The court of appeals, however effectively discounted all these indicia of juror impartiality found in the record. Instead, the court declared the jurors *voir dire* expressions of impartiality to be "totally unacceptable" and stated with respect to the jurors' disclaimers that ". . . we do not rest our decision on such a factual issue." *Flynn*, 749 F.2d at 965, Appendix at A-9.[13] In so doing, the court of appeals regrettably failed to heed the mandate of 28 U.S.C. §2254(d).

Thus, the petitioners submit, the court of appeals should have deferred to the presumptively correct state courts' factual finding that the presence of the troopers did not affect the impartiality of the jury and should have found that any alleged constitutional error, under the totality of these circum-

[13] Indeed, the court of appeals' conclusion that the troopers' presence must have prejudiced the respondent's right to a fair trial—despite the acquittal by the jury of three of respondent's co-defendants and the jurors' testimony during *voir dire* that they would not be influenced by the troopers' presence—displays an almost cynical attitude by the court towards the integrity and capability of the jurors.

stances, was harmless beyond a reasonable doubt. *See Rushen* v. *Spain*, __U.S. at____, 104 S.Ct. at 457; *see also*, *Kentucky* v. *Whorton*, 441 U.S. 786, 789 (1979); *Harrington* v. *California*, 395 U.S. 250, 251 (1969); *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

(B)

Rather than according the statutory presumption of correctness to the state courts' factual findings, the court of appeals made factual findings of its own—factual findings which were unwarranted, not found in the record, and plainly wrong. In so doing, the court of appeals impermissibly shifted the burden of proof from the respondent to the petitioners. As the petitioner in a habeas corpus proceeding, the respondent bore the burden of proving that his constitutional rights were violated by the presence of the troopers, *see*, *e.g.*, *Kennedy* v. *Cardwell*, 487 F.2d at 111, and that the state courts' factual determinations were erroneous, *see*, *e.g.*, *LaVallee* v. *Delle Rose*, 410 U.S. 690, 692 (1977).

Despite his obligation to do so, the respondent, however, in the habeas proceeding below, introduced no evidence and made no showing with respect to how he was prejudiced by the location and presence of the troopers. The court of appeals in *Flynn* cured that deficiency, in part, by making several factual findings concerning the location and duties of the troopers—albeit factual findings which were inaccurate and nowhere derived from the record.

The court of appeals most egregious factual mistake was its erroneous finding that the "defendants were brought to court accompanied by four uniformed, and conspicuously armed, state troopers . . ." *Flynn*, 749 F.2d at 962, Appendix at A-2. In fact, the state troopers *never* accompanied the defendants to the courtroom or at any other time.[14]

[14] Nor does the court of appeals explain how it could discern from the cold record that the troopers' holstered pistols, a regular part of their uniform, made them appear to be "conspicuously armed."

The court of appeals also described the troopers as "a constant guardian of four armed officers." 749 F.2d at 966, Appendix at A-10. It was however highly unlikely, if not impossible, that the jury could have regarded the troopers as a "constant guardian" since there were days on which the troopers were present and all of the defendants, as a matter of strategy, absented themselves from the trial. On those days the officers sat at precisely the same location in the spectator section as they did on the days when the defendants were present. Hence, the officers' continued presence in light of the defendants' sporadic absences undoubtedly gave the jury the impression that the officers were present for general security reasons rather than as a "constant guardian" of the defendants. Indeed, the trial judge noted that during the *voir dire* one of the jurors observed that the troopers could not have been guarding the defendants precisely because the defendants were absent from the trial.[15]

The court of appeals also questioned "...why they [the officers] needed to sit so conspicuously close to the defendants," *Flynn*, 749 F.2d at 962, Appendix at A-3, and the court of appeals stated that the jurors during more than two months of trial viewed "four armed troopers daily in court sitting immediately behind the defendants...," *id.* at 965, Appendix at A-9.

The court of appeals' assertion that the four officers sat "conspicuously close" to the defendants and "immediately behind the defendants" is a factual finding that the court made without any reference to the record or to the physical layout of the courtroom.

In fact, had the respondent satisfied his burden by establishing for the record the location of the defendants and the troopers, the record would have shown that during the

[15] According to the trial judge, the juror stated when asked what he concluded from the troopers' presence: " 'This being a criminal case, it may be the way all criminal cases are taken care of. I see no other reason because the defendants are not here.' " Transcript at 233. (Appendix at G-1).

trial one or more of the defendants regularly sat with counsel at the table in from the judge's bench. The remainder of the defendants sat in a line of chairs inside the bar six feet behind the counsel table. Outside of the bar, approximately five feet behind the line of defendant chairs, sat one of the state troopers. Whether that state trooper, seated in the public spectator section at that distance behind some of the defendants, and separated from them by the bar, could be construed as "immediately behind" the defendants is at least debatable. The remaining state troopers, sometimes two, sometimes three in number, however, were spaced across the first row of spectator seats which extended to the sides of the courtroom. They could hardly be construed as being "conspicuously close" to defendants.

Petitioners submit that the effect of these unwarranted and inaccurate factual findings and assumptions by the court of appeals was to impermissibly relieve the respondent from carrying his burden of proof in the habeas corpus proceeding.

(C)

The court of appeals' opinion in *Flynn*, in addition to improperly relieving the respondent of his burden of proof, also does violence to state and federal comity by callously disregarding the knowledge of the state trial judge who had to make a decision concerning the presence of security personnel during the heat of a notorious, highly publicized, and difficult trial—a trial which, because of the number of participants alone, presented obvious logistical and security problems. The trial judge in addition to being aware of the shortage of security personnel and the serious nature of the charges against the defendants—who were being held without bail—was also undoubtedly aware that there were witnesses in protective custody who would be appearing at the trial, and that respondent Flynn was an escapee from a Massachusetts prison at the time he allegedly committed the crimes for which he was being tried.

These were all relevant and permissible factors—especially the respondent's escape from a Massachusetts prison—for the trial judge to have considered in determining the necessity for the presence of security personnel. *See, e.g., State* v. *Peacher*, 280 S.E. 2d at 573-574 (in determining the necessity of guards in the courtroom, a court should consider whether defendant is in custody or free on bail at time of trial, the seriousness of the charges, and the defendant's character, particularly evidence of prior escapes or attempted escapes).

Despite the trial judge's probable knowledge of these factors, the court of appeals in *Flynn* held, in essence, that the trial judge's failure to state all of these relevant factors on the record was reversible error. This draconian approach, however, is not one that other courts have taken.[16]

Thus, for example the court in *United States* v. *Greenwell* noted that the record did not properly reflect whether there were or were not several uniformed, armed members of the Department of Corrections present through the trial. *Id.* 418 F.2d at 846. The court directed the trial judge to not only indicate what security measures were employed, but also to state the reasons, "including matters brought to his attention *dehors* the record or matters of which he may have taken judicial knowledge," concerning the security measures which were taken. *Id.* Similarly, the court in *United States* v. *Samuel*, 431 F.2d 610 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971), requested the trial judge to supplement the record with a succinct statement of all the reasons, facts, and matters from which he concluded that defendant should be tried in handcuffs. *Id.* at 615-616.

In the present case, petitioners submit that there were factors within the knowledge of the trial judge—particularly respondent Flynn's escape from a Massachusetts prison and the

[16] In fact, the absence of a record developed at an evidentiary hearing held to determine whether the circumstances of the case justified greater than usual security precautions, has been stated not to be, *per se*, reversible error. *See State* v. *Peacher*, 280 S.E. 2d at 574.

fact that witnesses would be appearing in protective custody —which, when combined with the security forces' manpower shortage, the serious charges against the respondent, and the fact that the respondent was not on bail, justified the presence of the troopers.

Petitioners specifically requested in their petition for rehearing before the court of appeals that the trial judge be allowed to supplement the record with a statement of all the reasons he relied on in concluding that the troopers should be present. *See United States* v. *Samuel* and *United States* v. *Greenwell*. The court of appeals denied the petition for rehearing without addressing petitioners' request, despite the fact that there is a statutory procedure readily available in habeas corpus proceedings which specifically allows the trial judge to issue a certificate setting forth the facts that occurred at trial. 28 U.S.C. §2245.

In addition, the court of appeals had the authority to enlarge the record on appeal to include material not before the district court. *See, e.g., Gibson* v. *Blackburn*, 744 F.2d 403, 405, n.3 (5th Cir. 1984). Petitioners submit that the court of appeals' refusal to use either of these procedures to supplement the record, under the circumstances of the present case, was inexplicable and unwarranted. The court of appeals' summary reversal of an otherwise error-free four month trial—involving enormous expenditures of public funds and of time by numerous persons—without allowing the trial judge to supplement the record was, petitioners submit, both wasteful and erroneous. Petitioners submit that, at the very least, this case should be remanded for reconsideration by the court of appeals after the trial judge has been allowed to state all the reasons he relied on in determining that the troopers should have been present.

Finally, there are potentially adverse consequences which may result from the court of appeals' decision in *Flynn*. That decision may prompt a plethora of habeas corpus petitions by defendants claiming that the mere presence of uniformed security personnel at their trials violated their constitutional

rights to a fair trial. The other two co-defendants in the present case have already filed petitions for habeas corpus on the ground that they were denied the right to a fair trial by the presence of the troopers. Moreover, trial courts in the First Circuit, and perhaps elsewhere, may now be deterred, for fear of summary reversal, from the common practice of using a few uniformed deputies to insure general courtroom security and order. As the Second Circuit noted in *Hardee*, "If the concept of 'law and order' is to be honored, it must be maintained by security forces." *Id.* 581 F.2d at 332. The *Flynn* decision poses a potential threat to the maintenance of courtroom order and security since the decision may be read by trial judges to prohibit the presence at trial of a small but visible security force in a neutral area of the courtroom absent a formal hearing and findings on the record.

For all the reasons articulated above, petitioners request that this court review the erroneous determination of the court of appeals by granting their petition for a writ of certiorari.

III. The Decision of the United States Court of Appeals for the First Circuit Conflicts With the Decision on the Same Federal Question by the Rhode Island Supreme Court.

Review by this court, by certiorari, is also appropriate in the present case because the Court of Appeals for the First Circuit has decided a federal question in a way that directly conflicts with the Rhode Island Supreme Court, a state court of last resort. *See, e.g.*, U.S. Sup. Ct. R. 17.1(a); *Lego* v. *Twomey*, 404 U.S. 477, 479 n. 1 (1972). In addition, the court of appeals' decision in *Flynn* indirectly conflicts with the pronouncements of other state courts of last resort which have addressed the issue of the effect of armed, uniformed guards in the courtroom on a defendant's right to a fair trial.

The direct conflict between the court of appeals and the Rhode Island State Supreme Court stems from the major premise of the court of appeals' holding in *Flynn*—that major

premise being that the presence of armed, uniformed officers was the functional equivalent of, and constitutionally synonymous with, the physical restraint of the defendant. Hence, the court of appeals endorsed the proposition that "the presence of armed, uniformed troopers is viewable as a form of physical restraint . . . ." *Flynn*, 749 F.2d at 962, Appendix A-3.

The court of appeals in trying to establish its major premise that the presence of armed, uniformed troopers was viewable as a form of physical restraint, relied on a quotation from the pre-trial Rhode Island Supreme Court decision in *Byrnes I*. The Rhode Island Supreme Court in that *Byrnes I* quotation stated:

> "The presence of armed, uniformed police officers . . . might be considered a form of restraint, and a showing of the need for their presence [the troopers] should be required in such circumstances . . . the presence of the state police is a decision that must be resolved by the trial judge after consideration of all relevant factors." *Byrnes I*, 116 R.I. at 927, 357 A.2d at 449, Appendix at F-2.

The Rhode Island Supreme Court, however, in the quotation above did not state or hold that the troopers' presence *was* a form of physical restraint. Instead, the Rhode Island Court stated that the presence of such officers "*might* be considered a form of restraint," *id.* (emphasis added), implying that under some circumstances the presence of armed, uniformed police officers might be a form of physical restraint, while under other circumstances it might not be.

The supporting citation in *Byrnes I* given by the Rhode Island Court for its statement was the A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, (Approved Draft 1968), Standard 4.1(C) Comment, Page 94. That approved draft has been finalized and in its present form is now embodied in Vol. III, A.B.A. Standards for Criminal Justice, Standard 15-3.1(c)(2d ed. 1980). The drafters of the current comment to Standard

15-3.1(c)[formerly Standard 4.1(C)] endorse the view that "ordinarily there should not be an excessive show of force through the attendance at the trial of a great many law enforcement officers." *Id.*, Comment to Standard 15-3.1(c) at 15.80-15.81. The drafters' annotation explaining that view, however, expressly notes that:

> "...whether an extraordinary number of custodial officers constitutes restraint is unclear ...in the cases in which only a few officers were present the appellate courts commonly disposed of the matter by simply stating that such circumstances do not support an inference of prejudice." *Id.* at 15.81, n. 18.

As the annotation suggests, there is a distinction, recognized in the case law, between the actual physical restraint of the defendant and the general presence of a few armed guards in the courtroom. Accordingly, the established rule is that the tangible physical restraint of a defendant, such as with shackles or handcuffs, is inherently prejudicial absent justification, while the mere presence of several armed guards in a courtroom is not tantamount to such physical restraint and is not deemed to be prejudicial *per se*. *See, e.g., People* v. *Duran*, 16 Cal. 3rd. at 291 n. 8, 545 P.2d at 1327 n. 8, 127 Cal. Rptr. at 623 n. 8; *State* v. *Peacher*, 280 S.E. 2d at 571, 572, 573 n. 6.

The Rhode Island Supreme Court, in considering the respondent's appeal of his conviction, obviously followed the well-established view, finding, implicitly, that the mere presence of the armed, uniformed troopers, without more, had not resulted in a deprivation of respondent's constitutional right to a fair trial. The Rhode Island high court's determination of that federal question squarely conflicts with the court of appeals' holding in *Flynn*.

The First Circuit Court of Appeals has become the first appellate court ever to hold that absent an explanation which satisfies the reviewing court, the presence of a few armed, uniformed police in the courtroom, by itself, is prejudicial and

results in the violation of the defendant's right to a fair trial. In so holding, the court of appeals has not only created a direct conflict with the Rhode Island Supreme Court but has also created an indirect conflict with several other state courts of last resort which have considered the issue. *See, e.g., People* v. *Duran*, 16 Cal. 3d at 291 n.8, 545 P. 2d at 1327 n.8, 127 Cal. Rptr. at 623 n.8; *People* v. *Harris*, 98 Cal. App. 2d at 664-665, 220 P. 2d at 814; *Zant* v. *Gaddis*, 247 Ga. at 718, 279 S.E.2d at 221; *State* v. *Daniels*, 347 S.W.2d at 876; *State* v. *Peacher*, 280 S.E.2d at 571-573, 573 n.6.

Thus, petitioners respectfully submit that this Court should grant their petition for certiorari in order to review and reconcile the direct conflict between the Court of Appeals for the First Circuit and the Rhode Island Supreme Court on this important federal question, and similarly to resolve the indirect conflict between the court of appeals' opinion in *Flynn* and the decisions of other state courts of last resort.

Conclusion

For all the foregoing reasons, petitioners respectfully request that this Court grant their petition for writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 84-1266.

CHARLES FLYNN,
PETITIONER, APPELLANT,

v.

TERRANCE HOLBROOK, et al.,
RESPONDENTS, APPELLEES.

Before
COFFIN, *Circuit Judge*,
ALDRICH and COWEN,* *Senior Circuit Judges*.

Argued Sept. 12, 1984.
Decided Dec. 7, 1984.

Barry P. Wilson, Boston, Mass., for petitioner, appellant.
John A. Murphy, Sp. Asst. Atty. Gen., Providence, R.I., with whom *Dennis J. Roberts, II*, Atty. Gen., Providence, R.I., was on brief, for respondents, appellees.

Petitioner Flynn appeals from the district court's, 581 F.Supp. 990, denial of a writ of habeas corpus. He, with five co-defendants, was tried to a jury in the Rhode Island superior court, charged with a highly publicized armed robbery of a safe deposit vault. There had been no violence. Flynn and two others were convicted; the rest acquitted. The convicted defendants appealed, unsuccessfully raising the points now presented. Flynn, alone, sought habeas corpus, again without success. We reverse.

* Of the Federal Circuit, sitting by designation.

From the start of the trial defendants were brought to court accompanied by four uniformed and conspicuously armed, state troopers, who sat, throughout, directly behind them in the front row of the spectators' benches. Upon defendants' timely protest that this created an "armed camp," the court stated that the matter was out of its hands, and that the makeup and number of the security squad was determined solely by delegates of the Supreme Court Committee on Security. To defendants' complaint that uniformed state police had never appeared at a Rhode Island trial before, the court replied,

> "But the rights of the defendants are equally safeguarded by an examination of the jurors."

Defendants immediately sought certiorari. In reversing and remanding, the Rhode Island Supreme Court (hereinafter court, or Rhode Island court) stated,

> "The presence of armed, uniformed police officers acting as a security force in criminal courtrooms in this jurisdiction is a departure from the practice usually found in the trial courts of this state.... [I]t might be considered a form of restraint, and a showing of the need of their presence should be required in such circumstances. A.B.A. Project on Minimum Stamdards for Criminal Justice, Standards Relating to Trial by Jury, (Approved Draft 1968), standard 4.1(C), Comment, p. 94.... The presence of the State Police is a decision that must be resolved by the trial judge after consideration of all relevant factors." *State* v. *Byrnes*, 116 R.I. 925, 357 A.2d 448, 449 (1976) *(Byrnes I)*.

The particular comment cited read, in part,

> (C) Defendants and witnesses should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, the judge should enter into the record of the case the reasons therefor....

The court's directions were plain. The presence of armed, uniformed troopers is viewable as a form of physical restraint, unusual, and not to be countenanced short of a finding that it was "reasonably necessary to maintain order." In such event the court was to record its reasons for so finding. In spite of this, when the hearing ordered by the court took place, nothing of any kind was offered as to the need, let alone as to an unusual need, to maintain order. The only evidence presented came from two officials, who testified to personnel problems. It seems that because of the demands of the Presiding Justice there was a shortage of commitment officers who generally handle prisoners. Consequently, a request for back-up had been made of the state police. Commitment officers were, if armed, not noticeably so. By union contract, state troopers could not appear out of uniform, or without visible arms. When it appeared that the Presiding Justice was sitting without a jury, defendants suggested to the court what might seem the logical solution, viz., to send the troopers to the P.J.'s court. The response was that this was an undesirable choice because the commitment officers were better trained than the police for the work in that court.

The evidence stopped there. Nothing was offered as to the character, conduct, or disposition of any of the defendants, or of any other circumstance that might threaten the maintenance of order. Obviously, there was no, and could be no, finding of such. Nor was attention, apparently, paid to counsel's assurances that their clients would behave, nor consideration given to why, if only armed officers were available, there needed to be so many, nor, finally, why they needed to sit so conspicuously close to the defendants. Hence, matters were back at square one, with, if we may say so, a thump. Convenience, a manpower shortage, even, incredibly, a union contract, determined who was to be present and, apparently, the troopers themselves, decided where they would like to sit. Alternatively, the prosecutor made that decision, which would be no better.

In an at best trivial recognition of the instructions to consider the need for special restraint, the trial judge stated that it was his "conviction that the Supreme Court [in giving its instructions] has not been informed that the defendants on trial here are being held without bail.... [If it were not for that] there would not be any state policemen in this courtroom, uniform or plain clothes." It seems hardly necessary to observe that many defendants are incarcerated during trial; indeed, they are the only ones as to which a need for restraint arises. Inability to make bail is the common factor that fathers the vast percentage of cases discussing excessive restraint. Even more to the point, the trial judge had apparently not read the court's order with enough care to note the third sentence thereof.

> "The petitioners, all of whom have been indicted on the charges of robbery, are being held without bail." *Byrnes I*, 357 A.2d at 448.

On this basis he held to his earlier belief that, so far as defendants' rights were concerned, it was enough to make inquiry on the voir dire whether the presence of the officers would affect the juror's decision, a practice he was already engaged in when he was reversed for its insufficiency.

(1) Unfortunately, as we shall develop, since physical restraint, or, more exactly, the exhibition thereof to the jury, is antithetical to the presumption of innocence, the *Byrnes I* order was not only correct, but constitutionally obligatory. *See Estelle* v. *Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Illinois* v. *Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The trial court's total, and, we may add, inexplicable failure to observe it, requires the vacation of a conviction resulting from a trial that lasted in excess of two months, without any other prejudicial error. Because of the seriousness of this, and the seriousness of our disagreement with the Rhode Island court's ultimate disregard of a basic constitutional principle, we write at greater length than we perhaps otherwise might.

His conviction having been affirmed on appeal, *State* v. *Byrnes*, 433 A.2d 658 (R.I. 1981) *(Byrnes II)*, post, Flynn, after several false starts, brought this petition. In denying the writ, the district court said,

> "To repeat the characterization employed by the Rhode Island Supreme Court, the circumstances of this trial were veritably 'extraordinary.' *Id.* at 663. And, the need for, and extent of, security measures are generally held to be within the sound discretion of the trial court. *United States* v. *Gambina*, 564 F.2d 22, 24 (8th Cir. 1977); *United States* v. *Clardy*, 540 F.2d 439, 442-43 (9th Cir.), *cert. denied*, 429 U.S. 963 [97 S.Ct. 391, 50 L.Ed.2d 331] (1976); *Kennedy* v. *Cardwell*, 487 F.2d 101, 108-09 (6th Cir. 1973), *cert. denied*, 416 U.S. 959 [94 S.Ct. 1976, 40 L.Ed.2d 310] (1974). *Cf. Woodard* v. *Perrin*, 692 F.2d 220, 221-22 (1st Cir. 1982). Even though security precautions may in some measure deprive a defendant of the physical indicia of innocence, they are not *per se* prohibited; rather, the necessity for the employment of such procedures obligates the trial court
>
> > to simultaneously discharge clashing duties.... On the one hand, it was incumbent upon the court to strive to preserve impartiality and to avoid allowing anything to undermine the defendant's presumption of innocence. On the other hand, the trial court was charged with the duty to preserve the safety of counsel, jury, witnesses, spectators—in short, everyone inside the courtroom.
>
> *Clardy*, 540 F.2d at 442-43. Judge Giannini, called upon to juggle these competing considerations, performed the resultant balancing with care. His conclusion that, in this instance, the interests of justice required the presence of the troopers, while perhaps fairly debatable, was well within the perimeters of his discretion. *E.g.*, *Gambina*,

564 F.2d at 24. The necessity for heightened security for this trial was manifest. As noted by the state supreme court, the *voir dire* of the venire disclosed no prejudice attributable to the presence of the police. Less totalitarian alternatives appear to have been explored and rejected on rational grounds. The security measures approved here, extreme though they may have been, did not, under the totality of the circumstances, deny due process or equal protection to the petitioner. *See Hardee* v. *Kuhlman*, 581 F.2d 330, 331-32 (2d Cir. 1978); *United States* v. *Howell*, 514 F.2d 710, 714-15 (5th Cir.), *cert. denied*, 423 U.S. 987 [96 S.Ct. 396, 46 L.Ed.2d 304] (1975)."

We extensively disagree. The Rhode Island court said the presence of the armed state police was an extraordinary event, not that the circumstances of the trial were extraordinary. The trial judge had not balanced with care the competing considerations of avoiding the undermining of the defendants' presumption of innocence and preserving the safety of counsel, jury, witnesses and spectators. Rather, with no threats shown to safety, he balanced nothing, but simply indicated a fear that since the defendants had not been bailed, they might flee from the courtroom. There was no evidence even suggesting any unusual likelihood of this; nor had anything whatever made "manifest" the necessity for heightened security." As for the exploration of less "totalitarian alternatives," the exploration was limited, notwithstanding defendants' suggestions, to inquiring whether regular commitment officers were available without inconveniencing the Presiding Justice, and whether the union contract permitted the state police to appear out of uniform and unarmed.

Even if, instead of falling far short, the facts had been as the court stated, the law as demonstrated by five of the six cases cited in its opinion would not have supported its result. In *Kennedy* v. *Cardwell*, 487 F.2d at 108-109 the court said,

"...[G]uards seated around or next to the defendant during a jury trial are likely to create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.... [G]uards can be strategically placed in the courtroom when more than normal security is needed and can be hidden in plain clothes, [and] the jury never needs to be aware of the added protection so that no prejudice would adhere to the defendant."

United States v. *Cardy*, 540 F.2d at 442-43 is to the same effect, the court emphasizing that the guards wore plain clothes, and carried their weapons concealed. To this we would add a citation to *United States* v. *Jackson*, 549 F.2d 517 (8th Cir. 1977), *cert. denied*, 430 U.S. 985, 97 S.Ct. 1682, 52 L.Ed.2d 379, where the court described a *Cardy* scenario as "maximum security." Again, in the court's twice cited case of *United States* v. *Gambina*, the court had noted, (a) that the defendant had been convicted of a prior attempt to escape, and had threatened to do so again, and (b) that instead of guards "seated around the defendant," the court had done its best to preserve the defendant's presumption of innocence by stationing nonuniformed marshals at the courtroom door. 564 F.2d at 24. These were hardly authorities to justify a finding of the trial court's careful balancing of "avoid[ing] allowing anything to undermine the defendant's presumption of innocence... [and] preserv[ing]...safety."

Such citations could be readily multiplied. The district court cited only one case to the contrary. In *Hardee* v. *Kuhlman*, 581 F.2d 330 (2d Cir. 1978) (2-1) the district court denied habeas corpus with relation to a state court murder trial in which several armed guards were continuously in the courtroom; one seated three feet behind the defendant. No special need was manifest. In affirming, the court noted that this was apparently New York procedure. The court cited no authority, and contented itself, as we believe it had to, by

disagreeing with, or attempting to distinguish, the many cases cited by the dissenting judge. We must regard the majority decision as singularly unpersuasive.

Most important of all, the district court failed to cite cases from our own circuit. In *Young* v. *Callahan*, 700 F.2d 32 (1st Cir. 1983), *cert. denied*, __ U.S. __, 104 S.Ct. 194, 78 L.Ed.2d 170, decided the year previous, we held it was an excessive, and hence unconstitutional, restraint to confine the defendant in a prisoner's dock during trial without a showing of special need, as being a "constant reminder of the accused's condition." 700 F.2d at 35. Of particular pertinency, we had said, "Where some form of security is essential, the dock seems far superior to surrounding the defendant with security personnel." *Id.*, at 36. The state's brief would distinguish *Young* by saying, "The use of a prisoner's dock to physically confine a defendant at trial is *obviously bound to be obtrusive and more likely prejudicial* to a defendant's right to a fair trial than is the mere general presence of armed police in the courtroom." (Emphasis suppl.) We can sympathize with counsel having to make bricks without straw, but not to this extent.

Returning to the case at hand, the trial judge was neglectful of the fact that his reversal had been with the court's knowledge that the defendants had not been admitted to bail; oblivious to the court's language and its citations of ABA Standards emphasizing that physical restraint should be the minimum needed, and, seemingly, forgetful that his reversal had occurred in spite of the fact that the jurors already, as the reversing court knew, were being examined for possible prejudice on the voir dire. Proceeding precisely as if nothing had happened, the trial court concluded,

> "I am firmly convinced [in the light of the voir dire, that the presence of the armed, uniformed troopers] in this courtroom, has no effect whatsoever upon the constitutional rights of these defendants."

To us surprisingly, in view of its own, explicit, opinion in *Byrnes I*, the Rhode Island court, based on the voir dire, with equal assurance, and equal lack of any supporting authority, agreed. "...[W]e find no reason whatsoever to fault his conclusion." 433 A.2d ante, at 663.

We might find it very difficult to have such total confidence in the jurors' disclaimers, even a priori, in light of the answers of some of them indicating a belief that the troopers were there to "protect" the jury and the audience. We would ask, protect them from whom? However, we do not rest our decision on such a factual issue. Even if all jurors had indicated an unreserved opinion that the troopers' presence would not affect them, such expression, on a case as extreme as this, where there was no need to rely on it, is totally unacceptable.

It is human nature to believe that one is able to disregard "irrelevancies," and to be totally fair and impartial, or, alternatively, it is human to be unwilling to admit publicly that one cannot. But even if one believed it fully at the time, insidiously this obliviousness can wear off. Observing, for over two months of trial, and constantly reminded, perhaps of the burden or of the expense, of keeping, not one, but four armed troopers daily in court sitting immediately behind the defendants, how could one help but think the state had cause to believe that there was a compelling necessity therefor. This was far more than a symbolic guard. Must not these, undoubtedly unarmed, defendants be very bad men, certainly not to be trusted? *See Kennedy* v. *Cardwell*, ante. Were some equally bad confederates going to try to spring them from the very courtroom? With all respect to the Rhode Island court, it is beyond our imagination how this vivid, and constant, show of force could fail to detract from the presumption of innocence.

At the expense of repetition, we are not talking about cases where a compelling necessity required the physical restraint, so that accepting the jurors' assurances is the best that could be

done. Nor are we concerned with a single incident which a juror might be able at least to remove from the front of his thinking. Further, there is a significant difference between seeing a defendant with a heavy armed restraint in the courtroom, and outside, simply while being transported. *United States* v. *Ayres*, 725 F.2d 806, 812-13 (1st Cir. 1984), *cert. denied*, __ U.S. __, 105 S.Ct. 84, 83 L.Ed.2d 31. Almost anyone might have a temptation to escape when outside of the courtroom and relatively free. Once defendants are safely seated inside, a constant guardian of four armed officers speaks in superlatives, in terms of extraordinary apprehension, not routine caution.

In this posture the state argues that the error was harmless. We doubt whether we could ever find such an unnecessarily striking display harmless. For a state to go out of its way to create this "extraordinary" atmosphere, to quote *Byrnes I*, and then turn around and say it was meaningless, comes, we regret to say, close to disingenuousness. In any event, we reject the reasons given for calling it harmless. The fact that the jury found some of the defendants not guilty could merely mean, if we were to be cynical, that it was demonstrating how open-minded it was. Or, it could have concluded that, as we are told, the evidence against some defendants was weaker than against others. The fact that close restraint was believed needed does not necessarily mean it was needed as to all the defendants.

Nor was the evidence against this defendant overwhelming. While we find the admission of the highly important identifying testimony, post, not to have been error, defendant's attack on it could not be called insignificant.

[2] In anticipation of a new trial, we deal briefly with Flynn's other points. We quite agree with the Rhode Island court's supporting the trial court's refusal to permit defendant's making an opening immediately following the prosecutor's, when counsel announced proposal was to argue the merits and demerits of the case rather than simply to

present the defense in narrative form. It is legitimate for a court to consider the purpose of an opening is to tell the jury what the case is all about, not to tell it how to go about deciding it. Flynn's approach, to attempt to persuade or influence the jurors by argument, was comparable to the growing tendency we have noted in other jurisdiction with respect to allowing counsel to conduct a psychologically-oriented voir dire, viz., to introduce the skills of advocacy before the evidence has even started. A trial should be on evidence, aided by advocacy, not the reverse.

[3] We also agree with the court in the matter of Flynn's choice as to his time of testifying. Early in defendants' case one of the other defendants called Flynn to the stand and asked him a few questions, including whether he, Flynn, had robbed the vault. On his denial, counsel turned him over to his own counsel, who said, "No questions at this time, Your Honor." Upon the court asking him what he meant by "not at this time," counsel replied that he did not know whether "any other cross-examination . . . will open an area that has not been opened up." None did. The state contented itself with introducing Flynn's criminal record, to which he made no rejoinder.

Later Flynn's counsel sought to put him back on the stand. The court reminded counsel of the local rule that permitted a witness to testify only once and refused. One member of the court has some question whether the record shows that defendant was sufficiently aware that his taking the stand for another defendant—a voluntary action, since, as a defendant, he was free to refuse—would be construed as a waiver of being called later on his own behalf. If he was, he caused his own predicament. We do not assume that this state rule would prevent a defendant's being recalled on rebuttal, or for some special reason, but we see nothing unconstitutional in a rule that says one cannot put in one's main testimony in segments. In any event, this question will not arise again.

[4] Finally, we affirm the propriety, under the fourteenth amendment, of eyewitness Barbara Oliva's in-court identification of Flynn as the second robber. The trial court excluded Oliva's pretrial identification of Flynn at his joint bail hearing, finding that the state's failure to have notified his attorney violated Flynn's sixth amendment rights. The admissibility of Oliva's subsequent in-court identification depends on its reliability under the totality of the circumstances, as determined by the five-part test of *Manson* v. *Brathwaite*, 432 U.S. 98, 114-16, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). Also pertinent is whether there was a "very substantial likelihood" that the illegal confrontation between the witness and the defendant tainted her later in-court identification. *See Neil* v. *Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972); *Simmons* v. *United States*, 390 U.S. 377, 383-84, 88 S.Ct. 967, 970-71, 19 L.Ed.2d 1247 (1968). By assessing these issues, *Sumner* v. *Mata*, 449 U.S. 539, 547, 549, 551, 101 S.Ct. 764, 769, 770, 771, 66 L.Ed.2d 722, and 28 U.S.C. § 2254(b) impose now upon defendant the considerable burden of proving, by convincing evidence, that the record does not support the court's findings. Unfortunately for him, the record provides ample support.

First, we find very unlikely any adverse effect of the confrontation on the in-court identification. Oliva made two accurate identifications of Flynn before she confronted him at his bail hearing. The first was on August 20, 1975, six days after the robbery. At this time she gave a detailed description of the first robber but, compared with her second description on August 26, only a partial description of the second. Although, once admitted, the jury could have questioned why her first description was not as complete as her second, we find her description on August 20 of Flynn's height, weight, hair color and style, and clothing, sufficiently detailed and accurate to permit a finding excluding a tainting effect from the later confrontation. *Cf. Velez* v. *Schmer*, 724 F.2d 249,

252 (1st Cir. 1984) (identification not accurate where witness fails to describe height, weight, build, skin color, "or other indicia of appearance"). Moreover, on August 26, Oliva fully described Flynn, including his facial features, and drew a picture of him which the court described as "not an unfair likeness."

True, there are arguable flaws. First is Oliva'a statement on August 20 that she could not say more about Flynn because she "did not see his face." Second is her failure to identify Flynn's photograph from those shown to her on August 26. The trial court interpreted her August 20 statement as referring to Flynn's entrance at the beginning of the robbery, at which time his arms obscured his face. The record supports this interpretation as plausible and our function is not to second-guess the trial court where its findings are supported. The court discounted her failure to select Flynn's photograph, observing that "[t]here is no similarity at all between that photograph and as Mr. Flynn appears today." We also note, in finding no taint from the confrontation if Oliva's in-court identification is otherwise reliable, that the confrontation itself was not highly suggestive. Unlike the facts before us in *Velez* v. *Schmer*, 724 F.2d at 250-51, the police never directly questioned Oliva during the confrontation. Neither did they tell her that Flynn was present at the bail hearing. Oliva had previously told the police that there were seven robbers; only five men appeared at the trial court, one other, Tillinghast, could have fit Oliva's general description of robber number two. Certainly, this confrontation was not necessary, *see Velez* v. *Schmer*, 724 F.2d at 251, but neither was it so suggestive as necessarily tainting the later identification, especially in light of her earlier descriptions.

Defendant's strongest point relates to the pillow-case interference with Oliva's vision. The jury did not accept it. We have read the testimony favorable to defendant with care, but

also the court's careful analysis of the evidence meeting it, and cannot say that the court was plainly wrong. The court saw the witness, and was impressed with her "extremely acute powers of observation and recollection and attention." It is not our duty to approach the question de novo.

Reversed; the writ to be granted.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. RHODE ISLAND.

C.A. No. 83-0528 S.

CHARLES FLYNN,

v.

TERRANCE B. HOLBROOK.

Charles Flynn pro se.
Dennis J. Roberts II, Atty. Gen., *John A. Murphy*, Sp. Asst. Atty. Gen., Providence, R.I., for defendant.

MEMORANDUM AND ORDER
Feb. 24, 1984.

SELYA, District Judge.

This application for a writ of habeas corpus was originally filed in the United States District Court for the District of Massachusetts, and was transferred here by order of that court (Garrity, D.J.) entered on August 18, 1983. The basis for Judge Garrity's order was that the named respondent (the superintendent of the Massachusetts Correctional Institution—Norfolk) was acting for the director of the Adult Correctional Institution, Cranston, R.I. Since the latter was and is the custodian ultimately responsible for the petitioner's confinement, transfer to this district appears proper. *Wilkins* v. *Erickson*, 484 F.2d 969, 972-73 (8th Cir. 1973). Jurisdiction anent the application is premised on 28 U.S.C. §§ 2241-2254.

The petitioner, Charles Flynn, was found guilty by a jury in the Rhode Island superior court, Judge Anthony A. Giannini presiding, on charges of robbery, kidnapping and a melange of

other crimes.[1] The trial arose out of one of Rhode Island's most infamous episodes (the so-called "Bonded Vault" hold-up, which took place on August 14, 1975). Subsequent to Flynn's 1976 conviction, he appealed to the state supreme court. That tribunal authored by Justice Murray, exhaustively analyzed and unequivocally rejected eight distinct arguments advanced by Flynn and his codefendants. *State* v. *Byrnes*, 433 A.2d 658 (R.I. 1981). Flynn's motion for reargument was denied on August 13, 1981.

Following conviction, imposition of sentence, and his unavailing appeal, Flynn (with others), represented by veteran counsel, filed in this court a petition for habeas relief substantially identical to the instant application. That petition, *United States ex rel. Byrnes* v. *Moran*, C.A. No. 81-0566, was, upon the recusal of Judges Pettine and Boyle, transferred on March 19, 1982 to the United States District Court for the District of New Hampshire (and there docketed as C.A. No. 82-162-D). Its lifespan in that district was brief; on May 7, 1982, Flynn and his co-petitioners withdrew the application (the Rhode Island Attorney general interposing no objection). Judgment was entered by the clerk on May 12, 1982. Nothing daunted, Flynn sought a reduction of his sentence in the state superior court, which motion was denied as to Flynn by a three-judge panel of that court in March of 1983. The instant proceeding ensued. Flynn has, in this application, dressed in constitutional garb seven of the eight arguments[2] which he unsuccessfully made to the state supreme court, and he presents those same questions for federal habeas review.

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[1] The offenses are limned in the state supreme court's opinion in *State* v. *Byrnes*, 433 A.2d 658, 661-62 & notes 1-8 inclusive (R.I. 1981). It would be pleonastic to repeat them here.

[2] In the state appeal, it was claimed that error adhered in the trial judge's refusal to permit a codefendant (Ouimette) to adduce surrebuttal testimony. *See State* v. *Byrnes*, 433 A.2d at 669-70. The contention (if, indeed, it was originally made by Flynn as well) is not reviewed here.

After effectuation of the transfer from Massachusetts and the docketing of the present application in this court, an order for delivery of transcripts and related material was entered on November 7, 1983. Following compliance with that mandate and the service of the state's answer, Flynn filed motions seeking (i) representation by a lawyer not a member of the bar of this court, and (ii) permission to proceed *in forma pauperis*. On December 7, 1983, those motions were referred pursuant to 28 U.S.C. § 636. After an evidentiary hearing, they were each rejected by a magistrate of this court on December 30, 1983. Neither denial was appealed.

I.

[1, 2] Before turning to the merits of the application, the court takes cognizance of the state's assertion that, given the entry of judgment adverse to Flynn in the prior habeas proceedings on May 12, 1982, *see* text *ante*, consideration of this petition is foreclosed by the mandate of 28 U.S.C. § 2244 in that the grounds are essentially identical.[3] "Abuse of the writ"

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[3] 28 U.S.C. § 2244(b) provides in relevant part:

> (b) When . . . after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

And, Rule 9(b), 28 fol. § 2254 specifies as follows:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

is an affirmative defense; it must be pleaded by the government. *Sanders* v. *United States*, 373 U.S. 1, 10-11, 83 S.Ct. 1068, 1074-1075, 10 L.Ed.2d 148 (1963) (citing *Price* v. *Johnston*, 334 U.S. 266, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948)). Where, as here, the defense has been put in issue, the devoir of persuasion rests with the applicant. *Price* v. *Johnston*, 334 U.S. at 292, 68 S.Ct. at 1063. It is true that the instant application largely replicates the earlier filing. Yet, "(f)or the first decision to be given controlling weight it must also be final on the merits." *United States ex rel. Irons* v. *Montanye*, 520 F.2d 646, 649 (2d Cir. 1975). *Cf. Sinclair* v. *Blackburn*, 599 F.2d 673, 675 (5th Cir. 1979) (*per curiam*), *cert. denied*, 444 U.S. 1023, 100 S.Ct. 684, 62 L.Ed.2d 656 (1980). Under this standard, the court cannot bestow preclusive effect on the petitioner's voluntary withdrawal of his earlier application, that withdrawal having specifically been made "without prejudice." The applicant has not heretofore received substantive federal review of his constitutional claims, and he is entitled to such scrutinization.

While this holding necessitates an examination of the merits of Flynn's contentions, that inquiry need not long detain the court. At the outset, it should be observed that the facts have been woven into a well-finished fabric in Justice Murray's opinion, *State* v. *Byrnes*, *supra*, and no useful purpose would be served in discussing them in a discursive fashion here. Rather, this court adopts the statement of the facts so set forth by the Rhode Island Supreme Court, augmenting the same where the context requires by particularized reference to the trial transcript ("T").

II.

(3) Flynn asserts that the state court abridged his sixth amendment right to counsel by prohibiting defense counsel from following in kind on the heels of the state's opening statement. Although petitioner paints this argument with so broad

a brush as to make it appear that a total deprivation of the right to open occurred, that is simply not the case. Contrary to the asseverations of the applicant, there was no outright denial of the opening statement prerogative even at the start of trial; rather, Judge Giannini laid down the ground rules ancillary to making an opening at that time. *E.g.*, T. 196. These rules were not constitutionally offensive in any manner. And, it is equally clear that the limitations which the trial judge placed on the efforts of Flynn's counsel to address the jury immediately after the prosecutor had made his opening statement, T. 179-190, were within his discretion. Flynn's counsel was unwilling to represent that a defense case would be put on, but sought essentially to preempt the prosecution by arguing in advance the merits (or lack thereof) of the state's evidence. This is not the function of a proper opening statement. *E.g.*, *ABA Standards of Criminal Justice*, *The Defense Function*, § 4-7.4 (2d ed. 1980). Flynn's counsel, although eschewing an opening statement then, did make one, subject to no special constraints, at the conclusion of the state's case. T. 3014. There is nothing in the record which suggests any substantial prejudice to Flynn's case arising out of the deferment of his counsel's opening.

[4, 5] As the Tenth Circuit has noted, "(t)he scope and extent of the defendant's opening statement rests largely in the discretion of the trial court." *United States* v. *Freeman*, 514 F.2d 1184, 1192 (10th Cir. 1975). The same can logically be said as to the timing thereof. Neither the applicant nor any other litigant has a vested right to open at the precise moment, and in the exact manner, that he chooses. R.I. R.Crim.P. 26.2, which provides in part that "(i)f a defendant chooses to make an opening statement, he may do so just prior to the introduction of evidence by the State, or just prior to presenting his case," does not require a different result. The language of the rule is precatory only, and there is no warrant for a federal court to overturn the state supreme court's construc-

tion of its own procedural rule as stopping short of granting the defense an absolute right to dictate the chrononomy of counsel's remarks. There was no error of constitutional dimension in Judge Giannini's rulings in this respect.

III.

[6] Flynn likewise challenges his in-court identification by a witness, Barbara Oliva. Flynn moved orally at trial to suppress this testimony, although his motion was, at least arguably, not timely made.[4] After an extensive *voir dire* hearing, the trial judge found that a pre-trial line-up in which Oliva had participated had been conducted in derogation of Flynn's sixth amendment rights. T. 1194-95. He barred that testimony, and then considered in detail the admissibility of Oliva's in-court identification of Flynn In a painstaking *ora sponte* bench decision, T. 1194-1213, which foreshadowed *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), he allowed the evidence. On appeal, the state supreme court, with the benefit of the Court's opinion in *Manson*, evaluated Judge Giannini's ruling, applied the five-part *Manson* test, *id.* at 114-15, 97 S.Ct. at 2253, and held that the trial judge did not err. *State* v. *Byrnes*, 433 A.2d at 665. The state court's reading of *Manson* appears to comport with accepted standards. *E.g.*, *Casiano Velez* v. *Schmer*, 724 F.2d 249, at 251-252 (1st Cir. 1984).

This court, in turn, has scrutinized the relevant portions of the trial record. The testimony palpably buttresses the findings and conclusions of the state judges. In particular, the holding that the in-court identification was free of any taint associated with the earlier spotting is supported by the reasonable inferences from the evidence, and by fair application of the calculus which *Manson* demands. Having in mind the deference which must be accorded to state court determinations of historical fact, *Sumner* v. *Mata*, 449 U.S. 539, 547, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981); 28 U.S.C. § 2254(d), the petitioner has not sustained his burden on this claim.

[4] *See State* v. *Maloney*, 111 R.I. 133, 300 A.2d 259, 265 (1973).

IV.

[7] Flynn's contention that the trial judge unfairly restricted cross-examination of various witnesses warrants short shrift. While this court recognizes that cross-questioning of witnesses is indeed "one of the safeguards essential to a fair trial," *Alford* v. *United States*, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931), and that undue abridgement of this formidable right in a state criminal prosecution has fourteenth amendment implications, *Pointer* v. *Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965), cross-examination is not available at the whim of the accused. The *Alford* Court was, therefore, careful to note that:

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court.

Alford, 282 U.S. at 694, 51 S.Ct. at 220. The trial judge's discretion in this respect has recently been characterized by the First Circuit as "wide." *Watkins* v. *Callahan*, 724 F.2d 1038, at 1044 (1st Cir. 1984).

[8] The state supreme court has so meticulously dissected Flynn's arguments in this regard, *State* v. *Byrnes*, 433 A.2d at 671-77, that this court can add little to that cogent analysis. Suffice it to say that both the trial record and the applicable law indicate plainly that no repressive curtailment took place in this respect; and that petitioner, vis-a-vis his right to interrogate the state's witnesses, received process that was due.

V.

The applicant also assigns as constitutional error that he "was not permitted to testify in his own behalf." Petition at 6. This labelling, however, distorts the record. Flynn was initially called as a witness by the codefendant Ouimette. He asserted no fifth amendment privileges. The direct examination, T. 2-890-891, quoted in full in the state supreme court's opinion, *State* v. *Byrnes*, 433 A.3d at 665, was a model of

brevity. Flynn's counsel declined to question him on this occasion. T. 2-891. The prosecutor's cross-examination was limited, and Ouimette's counsel was not permitted to reopen direct examination. T. 2-897. Flynn's lawyer later sought to call Flynn in his own case and was blocked in this effort. T. 2-897-901.

[9-12] The codefendants were, throughout the trial, evidently working hand-in-hand. *E.g.*, T. 3877-3878; T. 3922-3923. The trial judge had noted this phenomenon earlier in the proceedings. *E.g.*, T. 2-212-215. The state supreme court trenchantly observed that the rather curious events anent Flynn's testimony evinced "defense counsels' use of tactics in order to gain some strategic advantage." *State* v. *Byrnes*, 433 A.2d at 666.[5] And, the strategy backfired. Flynn had a full and fair opportunity to testify, but no counsel (including his own) went forward. Since the petitioner's attorney declined the trial judge's pointed invitation to question Flynn when he appeared on the stand at Ouimette's behest,[6] T. 2-891, it was within permissible bounds to refuse to accord the defendant a fresh opportunity. After all, the trial judge has broad discretion in the management of a case, criminal litigation or not. He has plenary power, subject only to review for abuse of discretion, to "determine generally the order in which parties will adduce proof." *Geders* v. *United States*, 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). Even so majestic a pronouncement as the sixth amendment "does not confer the right to present testimony free from the legitimate demands of

[5] That conclusion finds abundant support in the record. Indeed, counsel for Ouimette admitted that strategic considerations were at the heart of this roundelay. T. 2-901.

[6] It is important to note that, throughout the protracted trial, Judge Giannini allowed counsel for the other defendants to cross-examine witnesses called by one defendant; and, in effect, to convert witnesses by presenting direct testimony in that posture of events so as to minimize the delay inherent in the recalling of witnesses. *E.g.*, T. 3096. *Cf.* Fed.R.Evid. 611(b). The trial judge adverted specifically to this practice in thwarting the attempt to recall Flynn. T. 2-901.

evidence as to the events and conversations of January 3, 1976. This was all that the Constitution required. *United States* v. *Morrison*, *supra*; *United States* v. *Solomon*, 679 F.2d 1246, 1250-51 (8th Cir. 1982); *United States* v. *Sander*, 615 F.2d 215, 219 (5th Cir.), *cert. denied*, 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980). The claim that the state's conduct was so improper as to implicate Flynn's constitutional rights is simply not borne out.

VII.

The applicant also complains of the use of armed and uniformed state troopers to augment the committing squad (charged with maintaining custody of prisoners in court and in transit) at the trial. It is Flynn's lament that, in so doing, the trial judge transmogrified the courtroom into an "armed camp." Petition at 5. In order to place this claim into proper perspective, it is necessary to explore its antecedents.

Jury selection began in the superior court on April 12, 1976. Judge Giannini was requested to exclude the policemen in question, and declined to do so. An immediate petition for writ of certiorari was filed with the state supreme court; that tribunal initially refused to issue the writ. *State* v. *Byrnes*, 116 R.I. 923, 355 A.2d 411 (1976). While empanelment was still in progress,[8] however, the state supreme court on April 27 vacated its earlier denial of certiorari, and remanded to the court below to hold an evidentiary hearing so as personally to determine "the need for their [the gendarmes'] presence." *State* v. *Byrnes*, 116 R.I. 925, 927, 357 A.2d 448, 449 (1976).[9] Judge Giannini proceeded to take testimony from the chief of the committing squad and from a ranking officer of the state police. T. 114-136; T. 138-161. That evidence concluded on

[8] Jury selection was completed on May 21, 1976. T. 173. The panel was sworn on May 26, 1976. T. 175.

[9] Apparently, the state supreme court felt, upon reconsideration and with the benefit of a full transcript, that the trial judge might have impermissibly delegated his responsibility in this vein to an administrative body charged with oversight of judicial security. 357 A.2d at 448-49.

April 30, 1976. The trial judge then took the matter under advisement. In a lengthy and detailed bench opinion delivered on May 27, T. 219-234, Judge Giannini denied the defense motion to exclude the troopers. His reasoning, and the facts underlying his holding, are adequately summarized by the appellate court. *State* v. *Byrnes*, 433 A.2d at 662-63.

[14, 15] To repeat the characterization employed by the Rhode Island Supreme Court, the circumstances of this trial were veritably "extraordinary." *Id.* at 663. And, the need for, and extent of, security measures are generally held to be within the sound discretion of the trial court. *United States* v. *Gambina*, 564 F.2d 22, 24 (8th Cir. 1977); *United States* v. *Clardy*, 540 F.2d 439, 442-3 (9th Cir.), *cert. denied*, 429 U.S. 963, 97 S.Ct. 391, 50 L.Ed.2d 331 (1976); *Kennedy* v. *Cardwell*, 487 F.2d 101, 108-09 (6th Cir. 1973), *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). *Cf. Woodard* v. *Perrin*, 692 F.2d 220, 221-22 (1st Cir. 1982). Even though security precautions may in some measure deprive a defendant of the physical indicia of innocence, they are not *per se* prohibited; rather, the necessity for the employment of such procedures obligates the trial court

> to simultaneously discharge clashing duties.... On the one hand, it was incumbent upon the court to strive to preserve impartiality and to avoid allowing anything to undermine the defendant's presumption of innocence. On the other hand, the trial court was charged with the duty to preserve the safety of counsel, jury, witnesses, spectators—in short, everyone inside the courtroom.

Clardy, 540 F.2d at 442-43. Judge Giannini, called upon to juggle these competing considerations, performed the resultant balancing with care. His conclusion that, in this instance, the interests of justice required the presence of the troopers, while perhaps fairly debatable, was well within the perimeters of his discretion. *E.g.*, *Gambina*, 564 F.2d at 24. The necessity for heightened security for this trial was manifest. As noted by

the state supreme court, the *voir dire* of the venire disclosed no prejudice attributable to the presence of the police. Less totalitarian alternatives appear to have been explored and rejected on rational grounds. The security measures approved here, extreme though they may have been, did not, under the totality of the circumstances, deny due process or equal protection to the petitioner. *See Hardee* v. *Kuhlman*, 581 F.2d 330, 331-32 (2d Cir. 1978); *United States* v. *Howell*, 514 F.2d 710, 714-15 (5th Cir.), *cert. denied*, 423 U.S. 987, 96 S.Ct. 396, 46 L.Ed.2d 304 (1975).

VIII.

[16] The petitioner's claim that he was indicted by an illegally-constituted grand jury attempts to invoke the "fair-cross-section" requirement. *Duren* v. *Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Cf. Peters* v. *Kiff*, 407 U.S. 493, 503-04, 92 S.Ct. 2163, 2168-69, 33 L.Ed.2d 83 (1972). The excluded group is, in this instance, docents. *See State* v. *Jenison*, 405 A.2d 3, 8-9 (R.I. 1979). Yet, the state supreme court held that Flynn waived the right to raise this challenge by failing either to comply with R.I. R.Crim.P. 12(b)[10] or otherwise to assert such a claim prior to conviction. *State* v. *Byrnes*, 433 A.2d at 677-79. This is an "adequate" state procedural ground which forecloses federal habeas review on the issue—at least in Flynn's case, where the state does enforce the rule, *State* v. *Morin*, 422 A.2d 1255, 1256 (R.I. 1980), and where not a hint of a suggestion of "cause"appears. *Wainwright* v. *Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977); *Francis* v. *Henderson*, 425 U.S. 536, 542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976) (discussing "cause").

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[10] The pertinent portions of the rule are set forth in the state supreme court's opinion. *See State* v. *Byrnes*, 433 A.2d at 678 n. 14.

IX.

While the application, as framed, conceivably posits other questions, none are substantial and none require extended discussion. All such are, by this reference, rejected.

The trial was long, arduous, and bitterly contested. Flynn and his codefendants had the effective assistance of battle-hardened counsel who pulled out all the stops. The voluminous record documents Flynn's guilt beyond any serious nullifidianism. Under all of the circumstances, the trial judge's performance was nothing short of superlative. Flynn was fairly tried and justly convicted. The grounds proffered in support of the instant application for federal habeas review are uniformly meritless. The "red flag of constitutional breach," *Dougan* v. *Ponte*, 727 F.2d 199, at 201 (1st Cir. 1984), does not fly from these ramparts. To the contrary, Flynn has wholly failed to show that he is in custody in violation of any right secured to him by the Constitution.[11]

The petition must therefore be, and it hereby is, denied and dismissed.

So ordered.

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[11] Although the respondent has not asserted failure to exhaust remedies in bar of this application, the court has examined Flynn's claims in light of the recent teachings of the First Circuit in *Dougan* v. *Ponte*, *supra*. As noted in the body of this memorandum, *see* text *ante*, all of Flynn's points indubitably were raised in the prior state proceedings. The query remains, however, whether the petitioner's arguments to the state supreme court were properly focused so as to bring them within "the mainstream of constitutional litigation." *Daye* v. *Attorney General of State of New York*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc). In the absence of a specific exhaustion challenge by the state, the court has *sua sponte* undertaken an independent inquiry. While the question is close as to at least one point, *e.g.*, Part IV hereof *ante*, the court is satisfied that the applicant adequately identified his federal constitutional claims in the earlier appeal, and that the substance of Flynn's contentions in this proceeding was heretofore "fairly presented" to the state supreme court. *Anderson* v. *Harless*, __ U.S. __, __, 103 S.Ct. 276, 277, 74 L.Ed.2d 3, 7 (1982) (per curiam). The *Dougan* pinnacle appears to have been scaled. And, the court therefore declines to dismiss the application on its own initiative as one containing both exhausted and unexhausted claims. *See Rose* v. *Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

APPENDIX C

SUPREME COURT OF RHODE ISLAND

No. 79-412-C.A.

STATE

v.

Ralph BYRNES ET AL.

John A. Murphy, Providence, for plaintiff.
John F. Cicilline, Providence, and *William M. Kunstler*, New York City, for defendant Ouimette.
John F. Sheehan, Providence, for defendant Byrnes.
Peter DiBiase, Providence, for defendant Flynn.

OPINION
July 31, 1981.

MURRAY, Justice.

On the morning of August 14, 1975, nine masked men entered the Bonded Vault Co. (hereinafter Bonded Vault), a commercial safe-deposit company located in Providence. After allegedly robbing several Bonded Vault employees at gunpoint, the masked men proceeded to break into 146 of the 148 safe-deposit boxes located in the vault. They garnered approximately $4 million in cash and valuables from the robbery of the guards and the entry into the deposit boxes.

One of the alleged participants in the break, Robert J. Dussault (Dussault), who testified at great length for the state, was arrested in early January 1976 in Las Vegas, Nevada. Upon his return to Rhode Island, he made statements to Providence police and Rhode Island State Police implicating himself and several others in the robbery of Bonded Vault. Among those inculpated by Dussault were defendants Ralph Byrnes (Byrnes), Charles Flynn (Flynn), and John Ouimette (Ouimette), all of whom were later arrested in Rhode Island. Three other suspects were also arrested and charged with defendants.

Following a trial by a Superior Court jury, defendants Byrnes, Flynn, and Ouimette were convicted of various crimes arising out of their alleged activity on August 14, 1975. The defendants Flynn and Byrnes were convicted on four counts of robbery,[1] five counts of kidnapping,[2] and one count each of entry into a building with intent to rob,[3] possession of burglar tools,[4] possession of a pistol while committing a crime of violence,[5] and conspiracy.[6] The defendant Flynn also was convicted on one of unlawful possession of firearms,[7] and one count of assault with a dangerous weapon.[8] The defendant John Ouimette was convicted of one count of conspiracy and one count of aiding and abetting.[9] The three other suspects who were charged with defendants were found not guilty on all charges against them. The defendants timely perfected their appeal to this court.

The defendants in their appeal raise eight procedural and evidentiary issues. We shall advert to additional facts as they become necessary with respect to the various issues raised in this appeal.

I

On April 12, 1976, jury selection in this case began in the Superior Court. On that date counsel for defendants Byrnes, Flynn, and Tarzian requested the trial justice to exclude four armed, uniformed state troopers from the courtroom. This request was denied and the defendants objected. After a subsequent denial of defendants' oral motion for reconsideration of

[1] In violation of G.L. 1956 (1969 Reenactment) § 11-39-1.
[2] In violation of G.L. 1956 (1969 Reenactment) § 11-26-1
[3] In violation of G.L. 1956 (1969 Reenactment) § 11-8-3
[4] In violation of G.L. 1956 (1969 Reenactment) § 11-8-7
[5] In violation of G.L. 1956 (1969 Reenactment) § 11-47-3
[6] In violation of G.L. 1956 (1969 Reenactment) § 11-1-1
[7] In violation of G.L. 1956 (1969 Reenactment) § 11-47-8, as amended by P.L. 1975 ch. 278, § 1
[8] In violation of G.L. 1956 (1969 Reenactment) § 11-5-2
[9] In violation of G.L. 1956 (1969 Reenactment) § 11-1-3

the trial justice's decision on this issue, counsel petitioned this court for a writ of certiorari. In *State* v. *Byrnes*, 116 R.I. 923, 355 A.2d 411 (1976), this court denied the petition. On April 27, 1976, we vacated our earlier denial of certiorari and issued an order requiring the trial justice to reconsider his ruling and to make a personal determination as to the propriety of the presence of the state troopers during the trial. *State* v. *Byrnes*, 116 R.I. 925, 357 A.2d 448 (1976).

Subsequent to our remand, two witnesses appeared before the trial justice. One was Robert N. Mellucci, the Chief of the Department of Corrections Committing Squad; the other was Major Lionel J. Benjamin, Executive Officer of the Rhode Island State Police. The committing squad (now known as the Rhode Island State Marshals) is charged with the responsibility of maintaining the custody of prisoners while they are in the various courthouses or while they are being transported to and from the Adult Correctional Institutions.

Chief Mellucci made it quite clear that his squad was unable to satisfy the manpower demands being made upon it in April of 1976, at the time the so-called Bonded Vault case came on for trial. He informed the trial justice that in no way could the squad's eleven members service five different courtrooms. The squad's standard operating procedure called for two squad members for each prisoner being escorted into a courtroom. Six of the available eleven were slated for duty in Justice Francis J. Fazzano's courtroom. Four others were needed in a courtroom in which Justice William M. Mackenzie was presiding. Chief Mellucci testified that he presented his problem to Justice Fazzano, who in April of 1976 was in charge of the criminal calendar, and it was Justice Fazzano who contacted the State Police Department and sought its help in assisting the committing squad to discharge its obligation.

In his testimony, Major Benjamin disclosed that upon receiving the request for help, the State Police agreed to act "strictly as a backup" for the committing squad and that the

detail's duty was to make sure that those people who were coming into the Bonded Vault courtroom did not pose a threat to the judge, the attorneys, or the defendants. He also explained that the State Police was unionized and that its collective-bargaining agreement stipulated that details such as the courtroom security were to be assigned to the uniformed, rather than the detective division. The Major also informed the trial justice that, even if there were no contractual obligations, the detective division's manpower supply was such that there was no one available for a courthouse assignment. He testified that departmental regulations require that all uniformed troopers carry their weapons in their exposed holsters at all times, or, as Major Benjamin said, a "trooper never takes his weapon off anywhere."

The trial justice, in denying the motion to exclude the uniformed troopers from the courtroom, alluded to the committing squad's shortage and the State Police policy insofar as its uniformed personnel were concerned. He then addressed the issue of whether the presence of the troopers actually posed a threat to defendants' right to a fair trial.

In making his determination, the trial justice first pointed out that during the jury-selection process over 199 prospective jurors were interrogated. Many of that number had been excused before the presence of the troopers had been brought to their attention. The trial justice noted that of the fifty-four prospective jurors who were asked about the troopers, fifty-one said that the troopers' presence created no inference of guilt. The other three did not answer the inquiry directly, but two reported that they became "nervous" upon seeing a trooper in uniform. When the potential jurors were asked if they had any idea as to why the troopers were in court, the answers ranged from "didn't know" to "security" to "protection." Those who chose "protection" indicated that the protection was for everybody, including the defendants.

After considering the evidence adduced at the exclusion hearing, the trial justice observed, "I am firmly convinced * * *

especially with respect to the jurors we have in this box," that the presence of the armed, uniformed troopers "in this courtroom, has no effect whatsoever upon the constitutional rights of these defendants."

[1, 2] The handling of an extraordinary event which may arise during the trial, we have said, is a matter left to the sound discretion of the trial justice, and the manner in which he resolves the episode will not be disturbed by us absent a finding that he has abused his discretion. *Webbier* v. *Thoroughbred Racing Protective Bureau, Inc.*, 105 R.I. 605, 254 A.2d 285 (1969). Here, the trial justice gave a reasoned and careful consideration of the issues raised by the presence of the uniformed troopers and, after consideration of all relevant factors, found that the presence of the troopers in no way prejudiced defendants. We have reviewed the record, and we find no reason whatsoever to fault his conclusion.

II

[3] The defendants' second claim of error involves Rule 26.2 of the Superior Court Rules of Criminal Procedure.[10] In essence, this proviso states that before any evidence is offered at trial, the prosecutor may make an opening statement, and if the defense wishes to make an opening statement, it may do so just prior to the prosecution's introduction of testimony or just before beginning the presentation of evidence in support of the defense. Here, immediately after the prosecutor had made his opening statement, the defense made it clear that it wished at that moment to make an opening statement. In the statement, the jury was to be told that in considering the testimony of witnesses just alluded to by the prosecutor, the jury should pay attention to such factors as the witnesses' demeanor, their

[10] Rule 26.2 of Super.R.Crim.P. provides:
"Before any evidence is offered at trial, the State may make an opening statement. If a defendant chooses to make an opening statement, he may do so just prior to the introduction of evidence by the State, or just prior to presenting his case."

prior criminal involvement, their explanation about particular aspects of evidence which might be developed on cross- examination, and the reasons for any in consistencies in their testimony. The trial justice, after hearing this explanation, denied the request for an opening statement, pointing out that such commentary could be offered in final argument. The defendants described the trial justice's action as a denial of a basic right. We think otherwise.

[4] The proper function of an opening statement is to apprise the jury with reasonable succinctness what the issues are in the case that is about to be heard and what evidence the prosecution and the defense expect to produce at trial in support of their respective positions. *United States* v. *Breedlove*, 576 F.2d 57 (5th Cir. 1978); *Blackwell* v. *State*, 278 Md. 466, 365 A.2d 545 (1976); *State* v. *Martinez*, Mont. 613 P.2d 974 (1980); *ABA Standards of Criminal Justice, The Defense Function*, § 4-7.4 (2d ed. 1980).

Recently, in rejecting an argument almost identical to that being pursued by the defense, the Delaware Supreme Court, after noting the purpose of an opening statement, emphasized that such a statement should not be permitted " 'to become an argument on the case, or an instruction as to the law of the case.' " *Holmes* v. *State*, Del., 422 A.2d 338, 340 (1980). Here, we are not confronted with a total prohibition but with a limitation as to the scope of the opening statement. The trial justice's actions were similar to those taken in *State* v. *Griffith*, 97 Idaho 52, 56, 539 P.2d 604, 608 (1975), where, in sustaining a limitation as to the extent of a defendant's opening statement, the court observed that an opening statement is not an appropriate vehicle in which to "attempt to impeach or otherwise argue the merits of evidence that the opposing side has or will present." The reasoning of the trial justice in rejecting the defense's proposed opening statement was sound and will not be disturbed. Parenthetically, we would point out that on July 12, 1976, when the defense was about to begin its presentation of evidence, counsel for each of the appellants made an opening statement.

III

There were two identifications of defendant Flynn. Barbara Oliva (Oliva), one of the prosecutor's witnesses, identified Flynn at his bail hearing; however, the trial justice found this identification to have been conducted in violation of defendant's Sixth Amendment right to effective assistance of counsel. Oliva also made an in-court identification of Flynn, which the trial justice allowed to stand because he found that this identification rested upon a source independent of the unconstitutionally tainted pre-trail identification. Specifically, the trial justice found that Oliva's in-court identification of Flynn was based solely upon her observations at the time of the robbery. The defendants contend that the trial court erred in denying their motions to suppress the in-court identification of defendant Flynn by witness Oliva.

In *State* v. *Beaulieu*, 110 R.I. 113, 290 A.2d 850 (1972), we observed that the trial justice had carefully observed the requirement set forth in *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), that once a pretrial identification had been found constitutionally defective, the subsequent in-court identification is admissible only upon proof by clear and convincing evidence that it rests on a source independent of the tainted identification. In *State* v. *Souza*, 110 R.I. 261, 292 A.2d 214 (1972), this court again refused to reverse a trial justice's admission of an in-court identification notwithstanding the existence of a constitutionally tainted pretrial identification. *Id.* at 267-68, 292 A.2d at 217-18. In *Souza*, the trial justice found that the in-court identification was based upon a source independent of the constitutionally defective pretrial identification. There, we noted that,

> "[i]f the pretrial identification procedure is unconstitutional on either Sixth Amendment or due process grounds (or both), the *trial* identification by the same witness likewise may be inadmissible. With respect to the trial identification, however, the exclusionary rule is not a *per se* rule.

> Here it becomes relevant to determine the effect of the pretrial identification upon the trial identification. In some cases, the trial identification of a witness is admissible even though the witness identified the defendant at an unconstitutional pretrial confrontation. 1 Cipes, *Criminal Defense Techniques*, § 2.-04[2] at 2-12, 2-13 (1971)." *Id.* at 267, 292 A.2d at 218.

[5] Furthermore, in *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Supreme Court enumerated five factors to be considered in determining if an in-court identification is based upon a source sufficiently independent of an unconstitutional pretrial identification so as to "purge the taint of" the prior unconstitutional identification. These five factors are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Id.* at 114-15, 97 S.Ct. at 2253, 53 L.Ed.2d at 154. In the instant case the trial justice made a thorough evaluation of the material facts before determining that Oliva's in-court identification rested on a sufficient independent source, *i. e.*, her encounter with Flynn during the course of the robbery itself. The trial justice determined, relying on the record, that Oliva had ample opportunity to view defendant Flynn during the commission of the robbery of the Bonded Vault. The record also clearly supports the trial justice's finding that the witness was possessed of "extremely acute powers of observation and recollection and attention." In regard to both the accuracy of her description of Flynn and her level of certainty in identifying him, we further find that her identification meets the criteria set forth in *Manson*. Finally, with respect to the fifth criterion set forth in *Manson*, we find nothing in the record to indicate that Oliva's recollection of the events of the robbery was in any way eroded by the passage of time between the robbery and her in-court identification of defendant Flynn.

Based upon the foregoing, our finding is that the trial justice did not err in admitting Oliva's in-court identification of defendant Flynn.

IV

As their next specification of error, defendants claim that the trial justice committed error by refusing to permit defendant Flynn to testify on his own behalf. The state disagrees with defendants' characterization of the matter. Instead, it claims that we must focus upon whether or not the trial justice abused his discretion by ruling that defense counsel could not recall defendant Flynn as a witness.

The record shows that counsel for defendant Ouimette called Flynn as a witness for counsel's own client. Flynn testified as follows:

"Q Mr. Flynn, how old are you?
"A Thirty-six.
"Q Did you rob the Bonded Vault?
"* * *
"A No, I didn't.
"Q Do you know who did?
"A Yes, I do.
"MR. CICILLINE: I have no further question.
"MR. BROWER: No questions at this time, your honor
"THE COURT: What do you mean 'not at this time?'
"* * *
"MR. BROWER: I don't know if there [will] be any other cross-examination that will open an area that has not been opened up. At this time, I have no questions."

The prosecutor proceeded to cross-examine Flynn, concentrating only on Flynn's prior criminal record. He did not inquire about any matter raised during direct examination,

namely, Flynn's possible alibi or his knowledge of the perpetrators' identity. Counsel for defendant Ouimette then attempted to reopen direct examination of Flynn. The trial justice sustained the prosecutor's objection thereto. Flynn's own counsel then tried to call Flynn. He, too, was unsuccessful.

At the side bar the prosecutor argued the propriety of his objections, saying that defendants deliberately schemed to "open the door" just barely on Flynn's direct examination and then to allow the rest of his story to come out under cross-examination by the prosecutor. Apparently, defense counsel would then put on Ouimette's own case through redirect and cross-examinations of Flynn. The prosecutor argued that defense counsel had initially limited the scope of examination and could not now expand examination beyond attempts to rehabilitate Flynn's character, which had just been attacked on cross-examination.

Counsel for defendant Flynn argued that Flynn had an absolute right to testify or not to testify on his own behalf. Further, testifying as a witness on behalf of another defendant did not preclude his basic right because his testimony as another's witness had no bearing on the outcome of his own separate trial, notwithstanding the joint proceedings against all defendants. Finally, Flynn's counsel argued that Flynn could testify on his own behalf only by being recalled. He reasoned that the nature of the then-extant direct and cross-examinations had so limited the scope of further examination that Flynn's own case would never properly be elicited. The defendant Ouimette's counsel stated that as a matter of trial tactics he and Flynn's attorney had decided to divide the task of examining Flynn as far as his testimony would relate to Ouimette's own case. The trial justice denied defendant Flynn the opportunity to take the stand, saying that counsel had waived putting in Flynn's direct case at the proper time when he had decided not to inquire at the end of the initial direct examination of Flynn.

[6-8] We do not believe that the trial justice erred in his ruling. As we view the record, the determining factor is defense counsels' use of tactics in order to gain some strategic advantage. Their tactic failed. Yet in utiiizing that strategy, they knowingly and intelligently waived any further right to regain control of Flynn as their own witness. The trial justice made available to defense counsel an opportunity to examine Flynn prior to the state's cross-examination, which offer they refused. It is beyond doubt in this jurisdiction that the determination of the order of proof is within the sound discretion of the trial justice. *State* v. *Mathias*, R.I. 423 A.2d 484, 487 (1980); *State* v. *LaPlume*, 118 R.I. 670, 681, 375 A.2d 938, 943 (1977). We shall not disturb his decision unless it is clear that he has abused his discretion or that substantial prejudice resulted from the order of proof. *Id.*; *State* v. *Mattatall*, 114 R.I. 568, 571, 337 A.2d 229, 232 (1975); *State* v. *Spivey*, 113 R.I. 1, 4-5, 316 A.2d 498, 501 (1974). The defendants have shown neither abuse nor prejudice.

The defendants argue in their brief that the actions of the trial justice, in denying defense counsels' request to recall Flynn to the stand, prejudice them in relation to the conspiracy count of the indictment. Since the indictment charged them all with conspiracy, they assert that evidence exculpating one of them under the conspiracy count would tend "to exonerate all others similarly charged." The defendants' assertion is mere speculation because there is no evidence of what the exculpatory evidence might have been. The defendants' argument would be meritorious if the trial justice had never given Flynn an opportunity to take the stand and to testify either for another defendant or on his own behalf. The record in the instant case reflects that the trial justice did provide an opportunity for Flynn's attorney to examine Flynn at the time he felt was propitious to an expedited and orderly trial.

The defendants chose their trial strategy. They waived their opportunity to elicit what they now assert would have

constituted exculpatory evidence from Flynn in the hope that the prosecutor would take their bait on his cross-examination. The failure of the tactic may not be now used to revive their right to choose the course of their defense.

V

The jury in this case was sworn on May 26, 1976. The state rested its case on July 8, 1976, and was followed in natural course by the defense, which itself rested on August 4, 1976.

[9, 10] On Saturday, July 17, the quarters of the sequestered jury were burglarized. Upon the discovery of the burglary of the jurors' quarters, the management of the Holiday Inn contacted the Providence police department. Detective William B. Giblin (Giblin) and at least one patrolman responded to the call. Although he later admitted his presence in the area of the jurors' quarters, Detective Giblin informed the trial justice that he had had "no personal contact" with any of the jurors at that time but that a patrolman had questioned them in reference to the reported burglary. In court on July 19 the trial justice asked the assembled jurors whether the burglary of the previous Saturday evening had affected the ability of any one of them to render an impartial verdict. The record shows that none of the jurors responded in the affirmative to the judge's query. Defense counsel then requested the trial justice to poll the jurors individually regarding whether or not they had been "influenced in any way by any police officer who responded" to the scene of the burglary of their quarters. This *in camera* examination was conducted on the afternoon of the nineteenth of July. On the following day the trial justice reminded defense counsel, outside the presence of the jury, that on the nineteenth he had "informed you gentlemen * * * what those questions were, and they are now a matter of record, because the court's examination of each juror is a matter of record." The trial justice conceded the theoretical possibility

of improper influence on the jury but felt constrained to accept the responses of the individual jurors, each of whom reaffirmed his or her ability to render an impartial verdict.

On July 20, during the presentation of the defense case, all defendants moved to pass the case because of alleged prosecutorial misconduct. The basis for this motion was the fact that Detective Giblin, who served as the prosecution's case officer and was a key witness for the state as well, had reported to the scene of a burglary of the sequestered jurors' quarters at the Holiday Inn the previous Saturday evening. It should be noted that Detective Giblin's involvement in the state's case was more than peripheral or incidental. It was Detective Giblin who had interviewed some of the most important witnesses for the state, including Karyne Sponheim, Robert J. Dussault, Joseph A. Danese, and Barbara Oliva. Detective Giblin testified extensively regarding his conversations with these individuals and his subsequent investigation of their remarks. The defendants in their brief cite as error the action of the trial justice in refusing to pass the case upon learning of the involvement of Providence police detective William B. Giblin. Motions to pass are addressed to the sound discretion of the trial justice. His determination is to be accorded great weight and will not be disturbed on appeal unless clearly wrong. *State* v. *Pailin*, 114 R.I. 725, 729, 339 A.2d 253, 255 (1975). In *Chase* v. *DiMeo Construction Co.*, 100 R.I. 590, 217 A.2d 922 (1966), this court held that the trial justice had not abused his discretion in refusing to pass the case when the foreman and another juror, in the presence of their fellow jurors, stated that they each knew the brother of the plaintiff, who was serving as a witness for the plaintiff in the case. The trial justice was satisfied with the subsequent assurances of the members of the jury, including the foreman, that their impartiality remained unaffected by the incident. For this reason he denied defense counsel's motion to pass the case. We affirmed the trial justice's determination on the motion to pass in *Chase*. In the

constituted exculpatory evidence from Flynn in the hope that the prosecutor would take their bait on his cross-examination. The failure of the tactic may not be now used to revive their right to choose the course of their defense.

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At the interrogation or interview, Floody was shown several records that apparently contradicted his testimony regarding his whereabouts and thus his capability to place defendant Ouimette away from the scene of the robbery. As a result, Floody was informed that he could be charged with perjury. However, the prosecutor denied that Floody was ever intimidated, coerced, or physically threatened.

Out of the jury's presence, Floody testified under examination by the trial justice that he had told the prosecutor and the police that his earlier testimony was true. He also stated that the prosecutor had not believed him and that the prosecutor had said that he would charge Floody with perjury.

The trial justice ultimately ruled that the events complained of did not adversely affect appellant Ouimette's right to due process. The alleged intimidation of a witness is perforce a serious matter and to prevent a defense witness from testifying, by force or threat, can severely hobble a defendant's ability to present his case in its most favorable light. In *Webb* v. *Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), the United States Supreme Court reversed the petitioner's conviction because his only witness had refused to testify after hearing the trial judge address him on the danger of committing perjury. The witness had a prior criminal record and at the time of the petitioner's trial he was serving a sentence. When the witness was called, the trial judge admonished the witness to tell the truth, stating that if he were to lie, he would be indicted for perjury and his sojourn in prison would be lengthened. The witness then refused to testify and was excused by the court. The Supreme Court reversed the conviction for the unnecessarily harsh terms used by the trial judge and the prejudicial impact they had on the petitioner's case.

[11] The facts of the case at bar show rather different circumstances. Floody testified fully on his first day in court under direct and cross-examination. His credibility was an issue for the jury to decide and they remained totally unaware

of the events that occurred at the police station. Most impc·· tant, however, as the trial justice stated, Floody did not later reappear in court to recant his testimony. Through it all Floody stuck to his original testimony. We feel that without knowledge of that meeting the jury was still well able to evaluate Floody's testimony. Hence, we shall not find reversible error.

At a later point in the trial, Ouimette's counsel moved the trial justice to permit surrebuttal testimony. Counsel sought through additional witnesses, other employees of the body shops, to show that Floody had indeed appeared at those shops on the days in question. The trial justice denied his request.

The defendant Ouimete asserts as error the trial justice's refusal to admit his surrebuttal evidence to support his alibi. Floody had originally testified that on the morning of the robbery he had seen Ouimette at an auto-body shop he was inspecting for the state. The state called a series of witnesses in rebuttal who were employees and managerial personnel of several such shops that Floody claimed to have visited both on and around the day of the robbery. They all testified that they had not seen Floody. Defense counsel, including counsel for Ouimette, cross-examined each of these witnesses.

Ouimette argues that the trial justice's decision adversely affected his constitutional right to present a defense. Speaking to this issue, the United States Supreme Court said in *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, (1967), that the right to present a defense includes the right "to offer the testimony of witnesses, and to compel their attendance, if necessary * * *." The defendant contends that this general rule compels the admission of any surrebuttal testimony that is material and relevant to the presentatio.. of a defense; however, we note that *Washington* v. *Texas* decided merely that the Sixth Amendment right to compulsory process applies to the states via the Fourteenth Amendm·· t and held invalid a state statute that disqualified

an alleged accomplice from testifying for the defense. Although we freely endorse the above quotation from *Washington*, we conclude that the cited case is inapposite to the instant case. The facts in the case at bar require close scrutiny of the nature of the claim and the testimony. Reliance on the broad albeit cogent, definition in *Washingt·* · is therefore not the proper avenue of our analysis.

[12] The substance of the testimony shows a contradiction regarding the whereabouts of Floody. Ouimette placed himself, according to his alibi, at one of the shops that Floody stated he inspected on August 14, 1975. Floody so testified in order to corroborate the alibi. The state's witnesses stated that Floody was not present at the shops in question, thereby tending to refute defendant's alibi indirectly. The apparent goal of defendant's proffered surrebuttal was merely to reiterate Floody's presence at the shops. Under these circumstances, the exclusion of the proffered surrebuttal was entirely proper.

This court has already held that a witness may not be recalled to reiterate his position when his testimony is denied by a rebuttal witness. *Campbell* v. *Campbell*, 30 R.I. 63, 73 A. 354 (1909). We have also held that the decision to admit or exclude cumulative evidence must be left to the sound discretion of the trial justice. *Morrarty* v. *Reali*, 100 R.I. 689, 219 A.2d 404 (1966).

The standard for permitting surrebuttal was well stated by the Illinois Appellate Court in *Ross* v. *Danter Associates, Inc.*, 102 Ill.App.2d 354, 242 N.E.2d 330 (1968):

> "The purpose of surrebuttal is to permit the defendant to introduce evidence in refutation or opposition to new matters interjected into the trial by the plaintiff on rebuttal. [Citations omitted]. In other words, fairness requires that the defendant be permitted to oppose new matters presented by plaintiff for the first time which the defendant *could not have presented or opposed at the time of presentation of his main case.* Contrariwise, the purpose

> of surrebuttal is not the introduction of evidence merely cumulative to that presented by the defendant in its original presentation. [Citations omitted]. *It follows that the defendant has no right to present surrebuttal evidence merely because the plaintiff has presented rebuttal evidence.*" *Id.* at 367-68, 242 N.E.2d at 336-37. (Emphasis added).

The issue at bar is governed by *Campbell* and *Morrarty*, *supra*. Here, although counsel for defendant Ouimette did not attempt to recall Floody himself on this matter, the thrust of the testimony would have been similarly cumulative and reiterative.

[13] The crucial consideration on this issue is whether defendant could have presented the testimony offered to contradict the rebuttal testimony in his case in chief. *See People* v. *White*, 14 Ill.App.3d 1079, 303 N.E.2d 36 (1973). Here the answer is that defendant clearly could have done so. We do not deny that the proffered testimony is material and relevant; however, it was also material and relevant, albeit cumulative, before the state's rebuttal. *Cf. People* v. *White*, *supra* (surrebuttal was immaterial and irrelevant in defendant's case in chief; made material and relevant only by new matter contained in prosecution's rebuttal). We therefore find no reversible error in the trial justice's ruling.

A third claim of alleged prosecutorial misconduct involves statements made to the state's witness Robert J. Dussault by Providence police and Rhode Island State Police while Dussault was in custody in Las Vegas, Nevada. On January 3, 1976, Detective Giblin informed Dussault that he had heard that defendant Flynn had been killed within the past several days. Dussault testified out of the jury's presence that this knowledge prompted him to talk to police about the robbery. Detective Giblin testified that he and Sergeant Anthony Mancuso of the Rhode Island State Police had been searching for Flynn and that in December 1975 they had learned of Flynn's purported death from the FBI. (433 A.2d at 670).

[14] All defense counsel moved that the indictment be dismissed, arguing that the false and exaggerated report of Flynn's death had an unconstitutionally coercive influence upon Dussault. The trial justice denied these motions. At the same time he ruled that the events and conversations of January 3, 1976, were inadmissible for the jury's consideration. The trial justice concluded that the information imparted to Dussault was merely erroneous rather than intentionally false. The trial justice felt, as we do, that at all times through January 3, 1976, both Giblin and Mancuso had had a good-faith belief in the truthfulness of the FBI's information. Furthermore, there appeared no reason for them to discount the news when it followed a search for Flynn that had turned up nothing. The trial justice ruling was designed to avoid any prejudicial effect on the jury. He recognized that such testimony added little to the sizable accumulation of evidence presented by the state's case. We believe his ruling proper. *Cf. State* v. *Reardon*, 101 R.I. 18, 219 A.2d 767 (1966).[12]

VI

Next, defendants claim error as a result of the trial justice's admission into evidence testimony of their alleged acts and statements in Las Vegas, Nevada, between November 10, and 16, 1975. According to defendants, the substance of the challenged testimony was that defendants Flynn and Byrnes, with the witness Danese, went to Las Vegas on orders from defendant Ouimette to "coerce" the witness Dussault into silence. An article in the Providence Journal-Bulletin had detailed an agreement between the authorities and Dussault for his testimony.

[15] The defendants argue for the first time on appeal that such testimony was inadmissible because it went beyond the scope of the original indictment. They urge that the testimony was inadmissible and prejudicial because it was introduced

[12] We, therefore, need not address the issue of defendants' standing to assert objection to alleged coercive influences exercised upon Dussault.

purportedly "to show the character" of defendants and therefore to prove them guilty of the robbery. The defendants have failed to cite any reference to the record in support of their claims. Our examination of the record, however, indicates that defendants made no proper objection when the challenged testimony was adduced. The defendants must necessarily be deemed to have waived their claims related thereto.

VII

The defendants next urge reversal of their convictions on the grounds that the trial justice denied them the right of full cross-examination of several witnesses, in violation of their rights under the Sixth and Fourteenth Amendments to the United States Constitution. The defendants assert that the trial justice prevented defense counsels' "relevant and material" cross-examination in their "attempts to impeach the credibility of prosecution witnesses by exposing examples of possible motivation[s] to perjure themselves in the State's favor." In their brief, defendants detail the circumstances of the state's objections to questions asked of witnesses Karyne Sponheim, Detective Vincent D'Elia, and Joseph A. Danese by defense counsel.

Effective cross-examination of witnesses forms an important part of our justice system. The United States Supreme Court stated long ago in *Alford* v. *United States*, 282 U.S. 687, 51 S.Ct 218, 75 L.Ed 624 (1931), that the Sixth Amendment to the United States Constitution establishes a "substantial right" of cross-examination. It is "one of the safeguards essential to a fair trial." *Id.* at 692, 51 S.Ct. at 219, 75 L.Ed. at 628. Later, the Supreme Court made the right of cross-examination applicable to state criminal trials by incorporating the right into the Fourteenth Amendment's Due Process Clause. *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). In *Pointer*, the Court emphatically reiterated its view, stating:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." *Id.* at 405, 85 S.Ct. at 1068, 13 L.Ed.2d at 927

The importance of cross-examination as a factfinding tool cannot be gainsaid. In our decisions we have repeatedly said that the basic purpose of cross-examination is to impeach the credibility of a witness by discrediting the testimony adduced on direct examination. *See State* v. *Eckhart*, 117 R.I. 431, 435, 367 A.2d 1073, 1075 (1977); *The Atlantic Refining Co.* v. *Director of Public Works*, 102 R.I. 696, 713, 233 A.2d 423, 432 (1967). Not only is the right of cross-examination guaranteed and made applicable to the states by the Federal Constitution but art. I, sec. 10 of the Rhode Island Constitution also establishes the right. *State* v. *Meyers*, 115 R.I. 583, 589-90, 350 A.2d 611, 614 (1976).

The issue that defendants raised before us concerns the proper scope of their cross-examination. As valuable a factfinding device as cross-examination is, the practical problem that it invariably addresses is "proper scope." What areas of a witness's testimony, knowledge, or background are legitimately subject to probe upon cross-examination? Naturally, the tension of this problem lies between protection of the accused's right to a fair trial and the witness's right to be free of undue harassment. Appellate courts have traditionally left resolution of this problem, in the first instance, to trial justices. It is the trial justice who is charged with the responsibility of conducting a smooth and efficient trial while assuring that the rights

of all persons concerned therewith are protected. The Supreme Court in *Alford* v. *United States*, 282 U.S. at 694, 51 S.Ct. at 220, 75 L.Ed. at 629, stated:

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted."

Our decisions are in accord. *See State* v. *Eckhart*, 117 R.I. 431, 367 A.2d 1073 (1977); *State* v. *Ciulla*, 115 R.I. 558, 351 A.2d 580 (1976); *State* v. *Carraturo*, 112 R.I. 179, 308 A.2d 828 (1973). We now turn to consider individually the trial justice's rulings regarding each above-named witness.

The state called Karyne Sponheim to testify regarding her meeting defendants in Las Vegas and her intermittent contact with them, covering approximately a four-and-one-half month period from mid-August through December 1975. Defense counsel cross-examined her extensively about her meetings and contacts with defendants. They also attempted to elicit from her a motive for testifying, trying to establish the fact that either the FBI or the Rhode Island State Police promised her lenient treatment regarding threatened and possibly pending criminal charges against her in exchange for her testimony as a prosecution witness. The following questions and answers appear in the record:

> "Q Prior to your giving the statement, the tape recorded statement, were you promised anything so far as you would not be prosecuted for anything if you were to cooperate?
> "A No.
> "Q You weren't? Well, didn't you tell us before you went on the tape, Sergeant Mancuso threatened you, came down heavy on you and I could ask the FBI, Agent Scobie, how heavy he came down on you, and how he threatened you?
> "A Yes.

> "Q Okay, and what did he threaten you with?
> "• • •
> "THE COURT: • • • Is there anything further that he threatened you with Miss Sponheim?
> "WITNESS: Conspiracy after the fact, • • •
> "• • •
> "Q Well, when you say he threatened you, did he threaten you by saying unless you cooperate with us, and unless you give us a statement, this is what can happen to you, and you could be prosecuted for this, and we are going to get you for that, isn't that what you're talking about when you say threats and he came down heavy on you?
> "A Basically."
> [The questions and answers continued.]
> "Q What did you say?
> "A I said you don't have to threaten me because I didn't do anything wrong, and I came here on my own volition, and no one forced me to come here."

Of particular interest to defense counsel was the witness's alleged involvement in criminal activity on two separate occasions, and the possibility that law-enforcement authorities offered her a deal based on her alleged conduct. The record also indicates the following:

> "Q Were you promised anything by the FBI after you or during the time you gave statements to them concerning yourself—
> "MR. DeROBBIO: Objection.
> "MR. BROWER: May I finish?
> "• • •
> "Q —in conjunction with your testimony in this particular case, or your cooperation in this particular case?
> "MR DeROBBIO: I am going to object. The FBI could absolutely offer this woman nothing in the State of Rhode Island. They have no authority whatsoever, your honor, in conjunction with the testimony here.

"MR BROWER: I am not talking about the State of Rhode Island. I think that it's quite conceivable that the FBI could be concerning her testimony in this particular case give her some promises or rewards concerning activity in other states. I think that the statements made by Mr. DeRobbio on the FBI could give her nothing in the State of Rhode Island, while it is true as far as it goes, the FBI could make promises or give inducements regarding testimony within the State of Rhode Island.

"THE COURT: I am reflecting on whether or not it might be shown to the jury that promises were made if she were to testify in this matter. I'm not concerned about any other matters so far as this jury is concerned. Her credibility and whatever weight they will give to her testimony will depend upon what they deduce was her reason for testifying, and that might be a factor. So I guess the simple question here is did they promise her anything if she would testify here. I couldn't see it beyond that, Mr. Brower, unless you could point it out to me.

"MR. BROWER: That's what I'm asking for, her cooperation regarding this matter.

"THE COURT: What's wrong with that?

"MR. DeROBBIO: Nothing wrong with that question as phrased regarding this case.

"THE COURT: Yes

"Q Did you receive any promises from the FBI with regard to your cooperating in this matter here?

"A No one has promised me anything about anything. I came here just to tell the truth. I didn't come here because I have anything to hide. I came here because I was subpoenaed and I have nothing to hide.

"Q Didn't you have a conversation with Mr. Percell after January 4th where you told him you were scared?

"MR. DeROBBIO: Objection.

"THE COURT: I will sustain the objection.

"Q Did you have a conversation with Mr. Percell telling him that you were involved in two other matters?

"MR. DeROBBIO: Objection, your Honor. It is highly prejudicial, highly immaterial, not probative.

"THE COURT: Sustained.

"MR. DeROBBIO: And I ask he not engage in this type of questioning.

"THE COURT: Sustained. The jury will disregard it. We will deal with the evidence as it comes in.

"• • •

"MR. BROWER: I would like to make an offer of proof.

"• • •

[At the side bar:]

"MR. BROWER: Yes. I would represent to you that I would expect to deduce testimony that after January 4th that there [were] conversations between this witness and [Richard Percell] which would indicate or which would prove that this party could, through conversations with the FBI, had implicated herself as an accessory to robbery in two jurisdictions, one in Worcester and one, I believe it's Virginia, some southern state, and this party was very concerned about her, and felt that the only way there would be nothing done to her would be if she would cooperate with the people from Rhode Island, and give complete and full statements.

"• • •

"THE COURT: What I like to point out, I think you have established that foundation already. Her last statement is this, she says no one has promised me anything about anything. I take that to mean that nobody has given her any promises or inducements to testify, whether it be by way of financial inducements, immunity from prosecution. That means that's as blanket a statement as I can get.

"MR. BROWER: I just wanted to make sure it is on the record.

"THE COURT: This is the point. I don't think you have to refresh her recollection. She denies it. If you have somebody who can come in [Mr. DeRobbio has] got a right to recall her on rebuttal."

[16] There was no further cross-examination of this witness concerning her motive. We feel that the trial justice did not abuse his discretion in sustaining the state's objections to such further questioning or in deferring defendants' offer of proof to a later time. A similar situation was presented in *State* v. *Potts*, 239 Mo. 403, 144 S.W. 495 (1912). In that case, the Missouri Supreme Court determined that the trial judge acted well within his discretion in barring cross-examination regarding the chief witness's purported agreement with police. The defendant argued to the court that the trial judge should have allowed him to question the witness about whether he had agreed with the prosecutor to testify in exchange for the dismissal of the charges against him. The court examined the record and found that defense counsel had asked the witness about a possible agreement several times. Each time, the witness "expressly denied that any promise had been made to him by any person, and stated that his testimony against himself and the defendant was entirely voluntary." *Id.* at 413, 144 S.W. at 498. In the case at bar the record clearly shows that Sponheim twice responded to similar questions that she had not received promises in exchange for her testimony and that her sole desire in testifying was to be truthful. We think her appearance in court under subpoena is of no moment in light of her consistent denial of a deal.

At a later point in the trial, defendants recalled to the stand Richard Percell, who had earlier testified for the state. The defendants put him on the stand in order to establish that he had had a telephone conversation with Sponheim in mid-January 1976. Defense counsel tried to elicit from Percell that

Sponheim's association with prosecution witness Dussault and with defendants most likely caused her to make a deal with law enforcement authorities.

The substance of the relevant portion of his testimony is that when he spoke with Sponheim on the telephone in mid-January, he did not know she had given a statement to the authorities. He testified concerning the content of that phone call out of the jury's presence. Under examination by defense counsel, Percell said that Sponheim had told him that she was "scared" and in contact with the FBI. She said that she was afraid because she knew that defendant Flynn and prosecution witness Dussault had been arrested. Percell stated his belief that she feared being connected to them, although she never told him this directly. He further testified that he recalled for her certain facts. In particular, he told her that Dussault had given him a large amount of money. According to Percell's testimony Sponheim responded, "I know where he got it. It was from a robbery back East, just not too long ago." Sponheim also told him that she had waited in Dussault's car while he robbed the bank.

Our close examination of the record reveals that defendants sought to raise from Percell's testimony inferences that Karyne Sponheim had made a deal with authorities to testify in exchange for her freedom from any prosecution. Defense counsel attempted to draw the inference first that the authorities made Sponheim aware of Dussault's gift to Percell before Percell informed her of it. Second, defense counsel sought to infer that her knowledge of events, actions, and contacts involving Dussault and several of defendants would lead to institution of proceedings against her. Defense counsel ultimately sought to infer that as a result she felt impelled to make her alleged deal.

After listening to testimony of Percell and after reviewing his notes of Sponheim's testimony, the trial justice concluded her testimony was voluntary. The trial justice therefore refused to permit the jury to hear Percell's testimony.

The main weakness of defendants' position on this issue is that they failed to provide any independent, direct evidence of a promise or inducement given to Sponheim. As the trial justice pointed out, defendants did not confront her with any such fact while she was testifying, and, therefore, never established a predicate for the relevance of the testimony they sought to introduce. Nowhere in the record is there to be found a statement of Percell to indicate that a promise or an inducement was made to Sponheim in return for her testimony.

[17, 18] It is well settled in this jurisdiction that questions of the relevance of testimony lie within the sound discretion of the trial justice. *State* v. *Camerlin*, 116 R.I. 726, 729, 360 A.2d 862, 865 (1976); *State* v. *Verdone*, 114 R.I. 613, 617, 337 A.2d 804, 808 (1975). In the instnt case the trial justice determined that Sponheim's testimony was "voluntary." In so doing, he was in effect determining the relevance of Percell's testimony. We agree that such testimony had no probative value concerning the issue of whether Sponheim was biased against defendants. Therefore, we conclude that the trial justice acted well within his discretion when he excluded Percell's testimony.

The state called Detective Vincent D'Elia, a twenty-one-year veteran of the Providence police department, as a witness. He testified that at the time of the robbery he was assigned to the department's Bureau of Criminal Identification. Generally, his duty was to collect evidence at crime scenes. This included both photographing particular locations and articles, and searching for fingerprints. He testified also that on August 15, 1975, the day following the robbery, he proceeded to a parking lot located at Summer and Conduit Streets in Providence to investigate a report of a stolen panel truck allegedly used in connection with the robbery. Among other things, Detective D'Elia found a palm print "on the vent window of the driver's side." The defendants assign as error

the trial justice's refusal to permit cross-examination relating to identification of the palm print.

The following cross-examination appears in the record:

"Q Now as to the palm print that you took of the van, did you use that as a basis for comparison of anything?

"A Yes, I did.

"Q And when did you do that?

"A All different dates.

"Q Pardon me?

"A There was all different dates on that there.

"Q Do you have your notes with you?

"A Not on the palm prints, no.

"Q Well, were you submitted palm prints of the defendants in this case?

"MR. DeROBBIO: Objection.

"THE COURT: Sustained

"MR. BROWER: Well may I be heard, your Honor?

"THE COURT: Certainly.

"MR. BROWER: It's been evidence that a palm print was taken, put in direct examination.

"THE COURT: I understand that. No evidence as to whose they were. Any identification as to whose they were?

"MR BROWER: The prosecution cannot leave that standing on direct examination that a palm print is taken, and leave it there so an inference can be drawn either way."

The trial justice sustained the state's objection to defense counsel's line of questioning and denied the latter's motion to strike the reference in the direct examination to the palm print.[13]

[13] The defendants later recalled the witness who testified on their direct and cross-examination that he made no connection between the palm print and defendants. This is an entirely proper method. *Cf. State* v. *Thornley*, 113 R.I. 189, 319 A.2d 94 (1974).

[19] The trial justice acted well within his discretion in so ruling on this matter. As the trial justice stated, the prosecution did not put into evidence any identification adduced from the palm print. Nor did the prosecution try to establish that the witness even tried to make an identification of the print. The state did not provide a foundation of evidence leading ultimately to an identification, for it did not inquire concerning any procedures the witness may or may not have performed relative to the print. In our view, defense counsel merely tried to anticipate evidence that the prosecution, for whatever reason, chose not to enter at that time.

When defendants recalled the witness, they were free to extract from him their desired testimony. On their direct and cross-examinations defendants were able to put into evidence that the witness had indeed made several comparisons and that, ultimately, he had been unable to positively identify the print as belonging to any of them. The defendants were then entitled to such information by asking foundation questions concerning investigatory methods and comparison. Since these questions did not appear in the state's direct examination, defendants' attempts to cross-examine the witness at that point in the trial went beyond the scope of direct examination, merely anticipating possible future evidence. *Cf. State* v. *Mastracchio*, 78 R.I. 496, 82 A.2d 889 (1951).

[20] The final witness we consider, Joseph A. Danese, an admitted participant in the burglary, testified at great length for the state under a promise of immunity. The defendants first assert that the trial justice wrongly prevented cross-examination concerning the witness's employment background. However, defendants made no objection to the trial justice's ruling, and they must therefore be deemed to have waived their appeal on this point. *State* v. *Cline*, R.I., 405 A.2d 1192, 1209 (1979); *State* v. *Quattrocchi*, 103 R.I. 115, 117, 235 A.2d 99, 101 (1967).

Defense counsel moved onto other areas in their extensive cross-examination of the witness, and we take cognizance of their further objections. Once again, the central theme of their argument is that the trial justice unduly restricted the scope of cross-examination, thereby contravening defendants' constitutional rights under the confrontation clause. Our perusal of the record reveals that the trial justice did not abuse his discretion in excluding the contested questions. On the contrary, we uphold his rulings on evidentiary grounds that do not and need not bear upon any constitutional considerations.

The record notes defense counsel's attempt to impeach through the use of a prior inconsistent statement:

"Q Mr. Danese, it's a fair statement to say, is it not, that until such time as Mr. Dussault had concluded his testimony, in the bail hearing, that you never gave any of the details that you have given here today in court to anyone?

"MR. DeROBBIO: Objection.

"THE COURT: Read it, please.

[Read]

"THE COURT: Sustained.

"MR. BROWER: Note my objection.

"Q Now, Mr. Danese, you said that on August 14th you got into this van, and you, I believe you first testified, you changed into overalls, is that correct?

"A I did not change. I put them over the clothes that I had on.

"Q Well, Wednesday—strike that. Last week when you were testifying in direct examination, didn't you say that—just to direct your attention to the area, Mr. Danese—before Mr. DeRobbio asked you the question: Did anybody take off his clothes, before that, in response to a question from Mr. DeRobbio, didn't you say: 'We got in the van and we changed into the overalls?'

"MR. DeROBBIO: I'm going to object.

"THE COURT: Sustained.
"Q Did you change into the coveralls?
"A We—
"MR. DeROBBIO: Objection.
"THE COURT: Overruled.
"A We put the coveralls on over the clothing that we did have on.
"Q Well, I'm asking, is that what you did?
"A If you call that changing, that is changing.
"Q Do you call that changing, Mr. Danese?
"MR. DeROBBIO: Objection.
"THE COURT: I will allow it.
"A I would call it changing.
"Q Now you had some conversations, didn't you, with Mr. DeRobbio, as to the importance of no one taking off his clothes and changing that way into coveralls?
"MR. DeROBBIO: I am going to object. It's argumentative and it asserts a fact that he's ready to prove, and he should be put to the proof. Is he going to assure the Court he is going to prove this fact?
"THE COURT: Are you, Mr. Brower?
"MR. BROWER: No, I'm not, your Honor, and I don't believe I have to.
"THE COURT: I will sustain the objection.
"MR. BROWER: Note my objection, your Honor. I believe I am entitled—
"THE COURT: I have heard it.
"MR. BROWER: May I approach the bench?
"THE COURT: Certainly.
"[at the bench]
"MR. BROWER: May it please the Court, the defendant moves to pass under the terms of *Davis* v. *Alaska*, in that the Court is restricting the cross-examination to areas which should only be restricted on direct, in preventing the defendant from establishing the theory of defense to

cross-examination, that the ruling that in cross-examination every question that is asked, even if it asserts a fact which can be denied or affirmed by the witness on the stand, must first be represented to be proven[,] not only is not in accordance with *Davis* v. *Alaska*, but is in violation of the defendant's presumption of innocence of the constitutional rights. The defendant moves to pass.
"MR. DeROBBIO: If your Honor please, the only time I made objections to questions in this area is when there was an assertion in the question itself, that there was some allegation to the fact that certain facts were established or could be established by the defendant. And I feel that it is proper for the Court to demand of a defendant to be able to guarantee or an assurance that there will be proved at a later date, and this would be entered on a *de bene* basis with a question. This is one way of getting to the truth of the matter. But when a person, rawly brings in an allegation of fact in a question, and there is no assurance that it ever would be proved by the defendant, then I think it is an improper question in form, and the question should be asked in another way.
"THE COURT: The Court has made its ruling to the objection to the question. The motion to pass is denied.
"MR. BROWER: Note my objection."
[21, 22] On the basis of the foregoing excerpt, we hold that defense counsel's attempts to elicit from the witness prior inconsistent statements must fail because of the lack of any properly established foundation. Defense counsel's attempts to impeach by the use of prior inconsistent statements did not properly refer the witness to the time, place, or circumstances of the supposed inconsistency. *Dixon* v. *Royal Cab Co.*, R.I. 396 A.2d 930, 934 (1979); *State* v. *Vaccaro*, 111 R.I. 59, 64-65, 298 A.2d 788, 791 (1973). Where no proper foundation has been established, we shall not permit such questions, that attempt to attribute to a witness testimony that is not his or

such questions that falsely assume that the witness had previously testified differently. *See* 2 Underhill, *Criminal Evidence* § 495 (5th ed. cum. supp. 1978); 3 Wigmore, *Evidence* § 780 (Chadbourn rev. 1970).

VIII

As their final claim of error, defendants allege that they were indicted by an illegally constituted grand jury, an error rendering the indictments against them constitutionally defective. The defendants rely first on *State* v. *Jenison*, R.I. 405 A.2d 3 (1979), where we held unconstitutional a grand-jury selection process that systematically excluded members of the college and university academic community from jury service. They argue that our ruling in *Jenison* applies to them through the limited retroactive application provision given that rule in *State* v. *O'Coin*, R.I., 417 A.2d 310 (1980). In *O'Coin*, we permitted the defendant to challenge the composition of the grand jury that indicted her, notwithstanding her failure to timely file her objection in accordance with Rule 12(b)(2) and (3) of Super.R.Crim.P.[14] That rule requires criminal defendants to make such objections within twenty-one days after entry of a plea and before trial. We allowed her challange and quashed her indictment because, although untimely, she actually had raised he objection prior to the commencement of her trial. Subsection (b)(2) of Rule 12 allows a trial justice, in his discretion, to rule on such motions filed out of time for cause. We determined that the defendant showed sufficient cause

[14] Rule 12(b)(2) and (3) of Super.R.Crim.P. provides in pertinent part:

"(2) [D]efenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint * * * may be raised only by motion before trial. * * * Failure to present any such defense or objection * * * constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.

"(3) The motion shall be made no later than twenty-one (21) days after the plea is entered * * * but in any event the court may permit the motion to be made within a reasonable time after the plea is entered * * *."

because the grand jury indicted her before our decision in *Jenison* and therefore before she could have used the new rule in a pretrial motion. *State* v. *O'Coin*, R.I., 417 A.2d at 313.

[23, 24] We distinguish *O'Coin* from the case at bar. Here defendants failed to challenge the grand jury composition not only before trial, but also at any time prior to their conviction. Consequently, defendants raise the issue on appeal for the first time on appeal. In *State* v. *Morin*, R.I., 422 A.2d 1255 (1980), we said that under these circumstances the case is governed by the rulings of the United States Supreme Court In *Francis* v. *Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Davis* v. *United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973); and *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 83 S.Ct. 448, 9 L.Ed.2d 357, *reh. denied*, 372 U.S. 950, 83 S.Ct. 931, 9 L.Ed.2d 975 (1963). In order to avoid the penalty of waiver, the result of an untimely motion or a motion never filed, a defendant must show good cause as well as actual prejudice. *State* v. *Morin*, R.I. 422 A.2d at 1256. In the instant case, defendants have demonstrated neither. Therefore, we must rule that the matter is waived.

The defendants claim that they indeed filed a motion to dismiss the indictment against them before the trial but that the trial justice inadvertently failed to rule on the matter because of the vastness of the case and the volumes of paper it generated. The defendants argue that their motion is therefore still pending and that we must remand the case for a hearing on the matter. They are, however, partially mistaken. Our thorough search of the record reveals that defendants in fact filed such a pretrial motion on February 16, 1976 (beyond the twenty-one day post pleading time requirement of Rule 12(b)(3)). However, the basis of the motion did not concern the composition of the grand jury. Rather, defendants argued to the trial justice that the prosecution had coerced several key witnesses to testify as they had before the grand jury and as they would likely testify at trial. As a result of the colloquy

before the bench, the trial justice concluded that defendants' arguments were actually addressed to the question of bias or interest and ultimately concerned the credibility of these witnesses. The trial justice stated, and we concur, that "no question of the validity of the indictments has been raised." He then denied the motions, acting well within his discretion. We therefore adhere to our ruling that defendants may not raise the issue on appeal of the composition of the grand jury that returned their indictments when they have failed to raise the issue properly below.

In their brief, defendants raise a related issue concerning the trial justice's order that the jury be sequestered during the trial. The defendants claim that the length of the trial prevented many people from serving because of the "severe restriction sequestration [imposed]." The defendants requested that the trial justice reconsider his order because, they claimed, the jury was up until then composed largely of women who were either housewives or who were working to supplement their spouses' income.

[25] The defendants argued to the trial justice, and assert here as well, that such a jury does not represent a "fair cross-section of the community," in violation of *Taylor* v. *Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) and *State* v. *Jenison*, R.I., 405 A.2d 3 (1979). The trial justice temporarily denied their motion, pending any situation that would warrant reconsideration before the impaneling of the jury. The defendants point to no other place in the record, nor can we find any instance, where they again raised the issue before the trial justice. Ultimately, however, we find determinative of the matter the fact that all the defendants expressly stated their satisfaction with the composition of the jury just prior to its being impaneled. In view of the fact that the defendants proceeded to trial without renewing their objection, they cannot now be heard to argue that the jury's composition violated their constitutional rights.

For all of the foregoing reasons, the defendants' appeals are denied and dismissed; the judgments of conviction entered against them are affirmed. The papers in this case are remanded to the Superior Court.

BEVILACQUA, C.J., and SHEA, J., did not participate.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 84-1266

CHARLES FLYNN,
PETITIONER, APPELLANT,

v.

TERRANCE HOLBROOK, ET AL.,
RESPONDENTS, APPELLEES.

JUDGMENT
ENTERED: DECEMBER 7, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court denying the petition for writ of habeas corpus is vacated and the cause is remanded to that court with direction to issue the writ of habeas corpus in accordance with the opinion filed this day. Mandate to issue forthwith.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Wilson and Murphy]

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 84-1266

CHARLES FLYNN,
PETITIONER, APPELLANT,

v.

TERRANCE HOLBROOK, ET AL.,
RESPONDENTS, APPELLEES.

Before
CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER and TORRUELLA,
Circuit Judges.

ORDER OF COURT
Entered: January 11, 1985

Upon consideration of appellees petition for rehearing en banc,

It is ordered that said petition be denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Wilson and Murphy]

APPENDIX F

116 R.I. REPORTS 925 (1976)

M. P. No. 76-149. STATE v. RALPH S. BYRNES *et al.* This is a motion which asks that the court reconsider the denial of a petition for certiorari. The order denying the petition was entered on April 20, 1976. *State* v. *Byrnes*, 116 R.I. 923, 355 A.2d 411 (1976).

The petitioners, all of whom have been indicted on charges of robbery, are being held without bail. At the present time they are before the Superior Court, where a jury which will hear evidence on the robbery charge is being selected. When the jury selection process began on April 12, 1976, petitioners moved that four uniformed and armed State Troopers be excluded from the courtroom. The Troopers are seated to the rear of the defendants in a front row of seats usually occupied by spectators. They are, for want of a better description, part of the courtroom security force. The trial justice denied petitioners' motion, and this denial was the subject of their petition for certiorari.

The petitioners, in moving for reconsideration of our April 20, 1976, order, have furnished a transcript that was not available at the time this court originally considered the petition. The transcript shows that, after listening to one of the petitioners and counsel for two others, the trial justice remarked:

> "Now, looking to the question of what apparently some look upon as a loosely used term as that of 'security.' Perhaps the Court has been harboring a misconception, but let me let all of you gentlemen understand clearly that the presence of the troopers here, and the number of committing squad, is not by the dictate of this Court. Should you be laboring under the misconception that this

> Court has ordered the troopers here. then you are mistaken.*** The security that we have in this courtroom is, as the Court understands it, a direct result of those to whom that responsibility had been delegated by the Supreme Court Committee on Security. I am not familiar with the composition of that committee. I do know that our Presiding Justice serves as a member of that committee, but it is that committee which has delegated to the security officials the responsibility to determine in any trial, from their own information, what the security ought to be."

The trial justice concluded his remarks by emphasizing that the determination as to the need for the presence of the Troopers was the responsibility of certain staff advisers to a so-called security committee. "It is their judgment," he said, "and the Court will not consider overruling it, unless of course it appears to the Court that the defendants or the people cannot get a fair trial."

The presence of armed, uniformed police officers acting as a security force in criminal courtrooms in this jurisdiction is a departure from the practice usually found in the trial courts of this state. Earlier, in *State* v. *DeMasi*, 116 R.I. 905, 352 A.2d 399 (1976), the court said that the decision to apply physical restraint to a defendant in the courtroom was the sole responsibility of the trial justice. In the same vein, the presence of numerous uniformed, armed law enforcement officers might be considered a form of restraint, and a showing of the need of their presence should be required in such circumstances. A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, (Approved Draft 1968), standard 4.1(C), Comment, p. 94. The trial justice may not delegate responsibility that is his to the so-called security committee or its advisers. The presence of the State Police is a decision that must be resolved solely by the trial justice after consideration of all relevant factors.

APPENDIX G

STATE OF R.I. *v.* FLYNN, ET AL.

TRIAL TRANSCRIPT, VOL. I, P. 233
(BENCH DECISION, MAY 27, 1976)

[233] are in the courtroom. Her assumption was that anyone accused of crime is held at the prison. But armed state troopers do not lead her to believe anything about the character of the defendants. As a layman, she had no idea of what to expect in the courtroom. The others said they escorted the defendants here and escorted them back. Another guessed that they were present because they are authority and for protection. She was asked whose protection and the response was: "For mine and the people who are here." She went on to say she does not infer anything about the character of the defendants by their presence. Another said: "This being a criminal case, it may be the way all criminal cases are taken care of. I see no other reason because the defendants are not here." That was one of the days when the defendants were absent. "Because the defendants have been accused of a crime; Possibly to protect the defendants and in case something might possibly happen; The are here to protect the people, both sides."

From these responses, Gentlemen, I think it ought to be evident that none of the persons who were examined created any inference of guilt in their mind with respect to these defendants. And their responses as to the purpose for the state troopers being here lends substance and credibility to what these prospective jurors had to say.

I am firmly convinced, and I find on this testimony of the jurors, especially with respect to the jurors we have

* * *

APPENDIX H

TEXT OF STATUTES 28 U.S.C. §§2245 AND 2254(b), (c) AND (d)

§2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place. (June 25, 1948, c. 646, §1, 62 Stat. 966).

§2254. State custody; remedies in Federal courts

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the questions presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

APPENDIX I

PAGES 53-56 OF RESPONDENT FLYNN'S BRIEF TO THE RHODE ISLAND SUPREME COURT IN *State* v. *Byrnes*,____R.I.____, 433 A,2d 658 (1981)

Argument And Law

I.

THE TRIAL COURT ERRED IN PERMITTING THE PRESENCE OF ARMED UNIFORMED STATE TROOPERS IN THE COURTROOM DURING ALL TRIAL SESSIONS.

It is obvious, from the hearing held by the trial judge, following this Court's order of April 27, 1976, TT 114-161, App. at____, that there never was any real need of utilizing armed and uniformed State Troopers at appellants' trial. As Captain Melucci put it, there was "no reason" why these officers could not have "been assigned . . . to Judge Fazzano's courtroom where there's no jury, for use in that courtroom, to free the committing squad officers for use in this courtroom . . . ." Accordingly, we start with the premise that this "departure from the practice usually found in the trial courts of this state," App. at 2, was made without "a showing of the [required] need of their [the troopers'] presence . . . ." *Id.*

Moreover, as this Court recognized, "the presence of numerous uniformed, armed law enforcement officers might be considered a form of restraint . . . ." *Id.* While counsel certainly do not contend that the presence of four uniformed and armed State Troopers gave rise to the spectre of "mob domination" found in *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923), they do maintain that it undoubtedly had an adverse

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effect, insofar as appellants were concerned, on the sequestered jury. In *United States* v. *Hoffa*, 349 F.2d 20 (6th Cir. 1965), *aff'd* 87 S.Ct. 408, *rehearing denied* 87 S.Ct. 970, the Sixth Circuit held that four Deputy United States Marshals who attended trial did not violate the defendants' constitutional rights but emphasized that "[t]hey were dressed in *plain clothes*." 349 F.2d at 39. (Emphasis added).

In *State* v. *Pugliese*, 302 A.2d 124 (R.I. 1976), this Court had occasion to consider, again in an armed robbery case, the probable effect on the jury of the testimony, on redirect examination, by a key State's witness that a man who had come to his store after the crime had identified himself as "Pugliese's friend from up at the A.C.I." 302 A.2d at 125. When defense counsel moved for a mistrial because of this remark, the trial judge stated as follows:

> It seems to me that we are engaged in a running fiction here when we concern ourselves with this kind of observation that . . . the jury must never become aware of the fact that the defendant may be in custody. I think it's probably the expectation of the jury that someone who is accused of a serious crime is generally held for trial, that is the fact of the matter. 302 A.2d at 124-5.

In commenting on this extraordinary statement, this Court said:

> The trial justice's belief that the average juror probably realizes that all defendants charged with serious crimes are incarcerated at the time of trial is a proposition which we cannot endorse. To the contrary, it is just as reasonable to suppose that a juror viewing the members of the sheriff's department or the committing squad in a criminal courtroom believes that their primary purpose is to preserve the degree of decorum one expects to find in

> such surroundings. The jurors for the most part are novices to our system. For many their 2-week tour of jury duty is a first opportunity to observe the judicial process in operation. When a criminal case is on trial before a jury, every effort is made to insure that both a defendant on bail and an incarcerated defendant appear before the jury in the identical setting. *Id.* at 125.

Here, in a highly publicized and extremely lengthy case which was referred to by the prosecutor himself, in support of his jury sequestration motion, as "a very important case" with "a great amount of notoriety," TT 53, it was quite likely that the presence of the uniformed troopers, sitting directly behind the defendants, was not lost upon the jurors. Their daily appearance in the same place totally belied this Court's admonition in *Pugliese* that "every effort [be] made to insure that both a defendant on bail and an incarcerated defendant appear before the jury in the *identical* setting." 302 A.2d at 126. (Emphasis added).* As seen from the record, this salutary stricture could have easily been accomplished by using the troopers in a non-jury part and the Committing Squad officers freed thereby at appellant's trial. Moreover, appellants suggested several other alternatives such as bail, severance, a closed courtroom or coming to the court in pairs to obviate the claimed need for the troopers.** The vehemence of their repeated objections to the presence of the troopers can be seen from the fact that, not only did at least one defendant, Mr. Tillinghast, personally address the trial court on this issue, TT 75-78, but all chose to absent themselves from the jury selection process because of it. TT 89-92.

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* Indeed, the failure to do so would violate the Equal Protection Clause of the Fourteenth Amendment.

** It would seem, from the hearing conducted by the trial judge, that the real reason for using troopers was because of the union contract and the fact that only uniformed men received overtime pay. TT 144, 158, 160

OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(1)

No. 84-1606

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

TERRANCE HOLBROOK AND JOHN MORAN,
Petitioners,

V.

CHARLES FLYNN,
Respondent,

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes the respondent, Charles Flynn, in the above-entitled matter and requests that he be allowed to proceed in forma pauperis in his opposition to the petition for Writ of Certiorari.

In support thereof, the respondent directs the Court to the attached affidavit of Charles Flynn.

Respectfully submitted,

By his attorney:

Barry P. Wilson
59 Temple Place
Boston, MA. 02111
(617) 482-4352

No. 84-1606

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

TERRANCE HOLBROOK AND JOHN MORAN,
Petitioners,

V.

CHARLES FLYNN,
Respondent,

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

I, Charles Flynn, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed on the opposition to the petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my proverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
No

1b. I have been continuously incarcerated since January 6, 1976.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?
No

3. Do you own any cash or checking or savings account?
No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
No

5. List the persons who are dependent upon you for support and state your relationship to those persons.
I have a wife, Ellen Flynn, and son, Sean, but I am unable at the present time to support them.

6. Leave to proceed in forma pauperis was applied for by me in the District Court of Rhode Island on a pro se basis and was denied. However, I did not seek to proceed in forma pauperis in the Court of Appeals for the First Circuit.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties of perjury.

Charles J. Flynn
Charles Flynn

SUBSCRIBED AND SWORN TO before me this 21 day of Dec, 1985.

Notary Public

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

TERRANCE HOLBROOK AND JOHN MORAN,
Petitioners

V.

CHARLES FLYNN,
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHARLES FLYNN,
Respondent.

By: BARRY P. WILSON
59 Temple Place
Boston, MA 02111
(617) 482-4352

ON THE BRIEF:
LINDA H. MORTON

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITES

STATEMENT OF THE CASE

Respondent adopts Petitioners' Statement of the Case, as set forth within pages 3-6 of the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Petitioners misinterpret the opinion of the First Circuit Court of Appeals as establishing, for the first time, the mere presence of armed guards at defendant's trial to be a per se violation of the constitutional right to a fair trial. From this false premise, Petitioners erroneously develop and exaggerate the notion of "conflict" between forums. In fact, a closer scrutiny of the First Circuit's opinion would not attest to a per se constitutional violation, but a requirement of establishing a record of necessity where armed guards are present, in conformity to precedent within the First Circuit and other jurisdictions as well. Thus, review of the First Circuit's decision pursuant to a writ of certiorari is not warranted in the instant case.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS CITED BY PETITIONERS THEREBY PRECLUDING REVIEW UNDER U.S. SUP.CT. R. 17.1 (a)

Petitioners rely on the two decisions of Hardee v. Kuhlman, 581 F.2d 330 (2d Cir. 1978) and Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc) in support of their allegation that the decision by the First Circuit Court of Appeals in the instant case conflicts with the two prior decisions of other circuits cited above.

Petitioners' contention is improperly based upon the assertion that the First Circuit Court of Appeals held that "the mere presence of the armed guards to be constitutionally impermissible," (Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit, p. 12)[1] and hence a per se violation of defendant's right to a fair and impartial trial in

1. References to the Petition for Writ of Certiorari shall be described hereinafter as "Petition", followed by the appropriate page reference.

contravention of Hardee, 581 F.2d at 332, n.2. (Petition, p.18). On the contrary, the First Circuit's decision did not hold such security precautious are per se prohibited, but that it was incumbent upon the trial judge to "balance [] with care the competing considerations of avoiding the undermining of the defendants' presumption of innocence and preserving the safety of counsel, jury, witnesses and spectators." (Petitioners' Appendix at A-6).[2] The trial judge's error in the instant case, as tersely stated by the First Circuit Court of Appeals was that, "he balanced nothing." (Petitioners' Appendix at A-6).

Petitioners' use of the term "conflicts with" as applied to the disparity between the findings of the First, Second, and D.C. Courts of Appeal, is exaggerated and misleading. Although the First Circuit Court of Appeals did find the decision in Hardee to be "unpersuasive", (Petitioners'

2. For purposes of economy and expediency, Respondent shall refer the court to Petitioners' Appendix where appropriate, rather than submit an identical Appendix, pursuant to U.S. Sup.Ct.R. 30.

Appendix at A-8), their distinguishing of Hardee was based upon the absence of supporting case law in the Second Circuit's decision and simplistic reliance by the court on New York procedure. (Petitioners' Appendix at A-7).

In contrast with Petitioner's argument Dorman v. United States 435 F.2d 385 (D.C. Cir. 1970) more aptly comports with the First Circuit Court of Appeal's findings in the instant case. Although the D.C. Circuit would have preferred the trial judge to minimize the emphasis to the jury of defendant's custody status, the Court of Appeals of the District of Columbia found the "menacing manner" exhibited by the defendants, effectively paralyzing government witnesses, to have sufficiently interfered with the orderly progress of the trial to warrant further security precautions. Id., 435 F.2d at 397-398. Nonetheless, the Dorman court held that shackles or marshalls may be used only on a clear showing that the defendants pose an immediate threat to the peace and order of the trial. Id., 435 F.2d at 398 (emphasis added). Comparatively, because the

record in the defendant's case at bar was completely absent any such finding of significant interference with the trial proceedings, restraint was held to be unwarranted.

Petitioners' two faltering citations cannot stand against the plethora of cases supportive of the First Circuit's opinion that a showing of necessity is required prior to such extreme precautionary measures. See e.g., Estelle v. Williams, 425 U.S. 501, 504 (1976); United States v. Samuel, 431 F.2d 610,615-616 (4th Cir. 1970); Kennedy v. Cardwell, 487 F.2d 101, 108-109 (6th Cir. 1973), cert.den. 416 U.S. 959 (1974); United States v. Jackson, 549 F.2d 517, 527 (8th Cir. 1977), cert.den. 430 U.S. 985 (1977); United States v. Estremera, 531 F.2d 1103, 1113 (2nd Cir. 1976) cert.den. 425 U.S. 979 (1976); Burwell v. Teets, 245 F.2d 154, 168 (9th Cir. 1957) cert.den. 355 U.S. 897 (1957).

Additionally, as noted by the First Circuit Appeals Court's Opinion in Mr. Flynn's case, there exists controlling precedent within the First Circuit on the analagous issue of unconstitutional

confinement of a defendant in a prisoner's dock without a showing of necessity. Young v. Callahan 700 F.2d 32 (1st Cir. 1983), cert.den. 104 S.Ct. 194. (Petitioner's Appendix at A-8).

Even assuming arguendo any conflict exists, said discrepancy cannot be held to be of the "real and embarassing" nature to warrant review. Rice v. Sioux City Memorial Parks, 349 U.S. 70, 79 (1955), citing Layne and Bowler Corp. v. Western Well Works Inc., 261 U.S. 387, 393. Therefore, any allegations by Petitioner as to "conflict" between the Circuits concerning the issue at bar are misleading if not patently incorrect, and therefore preclude review by this Court under U.S. Sup. Ct. Rule 17 1(a).[3]

3. Based upon Petitioners' erroneous interpretation of the First Circuit's opinion to have established a per se violation where security precautions are taken (Petition, p. 18) as well as their failure to acknowledge existing controlling precedent within the 1st Circuit in Young v. Callahan, as argued above, Respondent feels that response to Petitioner's Argument I (B) is unnecessarily repetitious.

II. THE ABSENCE OF FAIR SUPPORT IN THE TRIAL JUDGE'S FINDINGS DOES NOT MERIT FURTHER INQUIRY.

Petitioners argue, somewhat contradictorily, that there was "fair support" in the record for the State Court's factual findings, that certain findings of the First Circuit Court of Appeals were erroneous, and that the case should have been remanded for further factual findings.

On the contrary, it was precisely because the trial judge did not adequately support his findings in the record for his conclusion of a manifest necessity for the presence of armed guards that the First Circuit reversed. (Petitioners' Appendix at A 3-6)

In contravention of their first argument, II (A), pp. 18-22, Petitioners further argue, on pages 24-27 of their brief, that the case should have remanded for further factual findings, thus admitting the absence of "fair support".[4]

4. As set forth in Petitioner's Statement of the Case (Petition,p.4) the trial judge was ordered, on April 27,1976, by the Rhode Island Supreme Court to make a personal determination as to the need of State Troopers' presence after considering "all relevant factors." State v. Byrnes, 116 R.I 925,927 (1976). (Petitioners' Appendix at C-3).

Petitioners' request was addressed and remanded by the Rhode Island Supreme Court. (Petitioners Appendix at C-3). Yet, the "relevant factors" found remained inadequate, according to the First Circuit. (Petitioners' Appendix at A-3). We are clearly beyond the stage of further factual inquiry at this point.

Finally, Petitioners indicates trivial discrepancies in the First Circuit's factual findings. Although disparities raised by Petitioner maybe "debatable", as Petitioner contends, the argument only points again to the basis of the First Circuit's holding - that the record was inadequate as to specific factors balanced by the trial judges to support his finding that the guards' presence was not a constitutional violation.

VII. THE DIFFERENCE BETWEEN THE HOLDINGS OF THE FIRST CIRCUIT COURT OF APPEALS AND THE RHODE ISLAND STATE SUPREME COURT DOES NOT RISE TO THE LEVEL OF "CONFLICT" TO MERIT REVIEW BY THIS COURT

Petioners again misenterpret the First Circuit's opinion as holding the presence of a few armed guards to be a form of physical restraint and, herce, a per se violation (Petition, pp. 29-30). From a review of the opinion of the State Supreme Court of Rhode Island and that of the First Circuit, it is apparent that the two forums are in agreement that armed guards may be viewed as a form of physical restraint, and consequently, their presence requires a showing of necessity. The only difference in the Courts' opinions is whether such necessity was adequately demonstrated in this particular case. Thus the "conflict", if any, is not one of gross proportion, as implied by defendant's argument, and certainly not one meriting further review by this Court. See, Rice v. Sioux City Memorial Parks, 349 U.S. 70,79 (1955), citing Layne and Bowler Corp. v. Western Well Works Inc., 261 U.S. 387, 393 (1923).

CONCLUSION

For the foregoing reasons, Respondent Charles Flynn requests that Petitioners' Writ of Certiorari be denied.

Respectfully submitted,

By his attorney:

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AMICUS CURIAE

BRIEF

(2)

No. 84-1606

In the Supreme Court of the United States

OCTOBER TERM, 1984

TERRANCE HOLBROOK and JOHN MORAN,
PETITIONERS,

v.

CHARLES FLYNN,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE STATE OF INDIANA, ET AL.

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No. 84-1606

TERRANCE HOLBROOK and JOHN MORAN,
PETITIONERS,

v.

CHARLES FLYNN,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE STATE OF INDIANA, ET AL.

Interest of the Amici Curiae

The undersigned amici curiae are the Attorneys General of their respective states. The interest of the amici stems from their belief that the opinion of the United States Court of Appeals for the First Circuit in *Flynn* v. *Holbrook*, 749 F.2d 961 (1st Cir. 1984) (hereinafter "*Flynn*"), if allowed to stand, may have a serious and adverse impact on the administration of the criminal justice systems—particularly the maintenance

of courtroom order and security—in each of the respective states represented by the amici curiae. For the reasons which follow, the undersigned amici curiae respectfully request that this Court grant certiorari to review the court of appeals' decision in *Flynn* and the important issues involving the presence at criminal trials of uniformed or armed policemen—particularly at trials involving highly publicized crimes or crimes of violence.

Argument

I.

The amici curiae fully endorse and support the arguments in favor of granting certiorari set forth in sections I(A) and (B) of the petition for certiorari. It is clear, as the petitioners have argued in those sections, that the court of appeals' decision in *Flynn* conflicts with prior decisions by the Second Circuit Court of Appeals in *Hardee* v. *Kuhlman*, 581 F.2d 330 (2nd Cir. 1978) and with the District of Columbia Circuit Court of Appeals' decision in *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970) (*en banc*). Furthermore, as the petitioners assert in section I(B) of their petition, the *Flynn* decision appears to be out of line with the authorities—those authorities generally holding that the mere presence of a few armed or uniformed guards in a courtroom during a defendant's trial does not, without more, violate a defendant's right to a fair trial.

In addition, the amici curiae agree with the petitioners that neither *Estelle* v. *Williams*, 425 U.S. 501 (1976) nor *Illinois* v. *Allen*, 397 U.S. 337 (1970) should be read to require the reversal of a defendant's conviction after an otherwise error free trial only because a small number of uniformed or armed policemen were present in the spectator section of the courtroom during the trial.

From the standpoint of the amici curiae, the conflict between the circuits created by the court of appeals' decision in *Flynn*, and the contravention of an established line of authority resulting from the *Flynn* decision, may have an adverse impact on the maintenance of courtroom order and security in state court criminal trials. Specifically, the amici curiae are concerned that the *Flynn* decision may deter state court trial judges from obtaining adequate courtroom security in cases similar to *Flynn*. The problem does not lie with the extreme cases. That is, in one kind of extreme case, where, for example, all the defendants have exhibited violent tendencies, are charged with violent crimes, or where threats have been made to trial participants, the need for uniformed guards in the courtroom is obvious. *See, e.g., Allen* v. *Montgomery*, 728 F.2d 1409 (11th Cir. 1984). At the other extreme, for example, in cases where a single defendant is charged with a petty misdemeanor, there obviously is little need for courtroom security in the form of uniformed or armed security personnel.

In intermediate cases, however, like *Flynn*, where there are multiple defendants charged with serious felonies, and where witnesses may be appearing in protective custody or one or more of the defendants may have a record of escape, there is, the amici curiae respectfully submit, a need to maintain courtroom order, security, and decorum—a need which may have nothing to do with physically guarding defendants who may be in custody.

It is this general need for courtroom security in such cases—particularly highly publicized cases—that the court of appeals in *Flynn* has regrettably ignored or overlooked. As the Second Circuit Court of Appeals observed with respect to general courtroom security, "If the concept of 'law and order' is to be honored, it must be maintained by security forces." *Hardee*, 581 F.2d at 332.

After the *Flynn* decision, state court trial judges may be deterred from providing adequate courtroom security in the form of uniformed bailiffs, state marshals, or sheriffs who might otherwise be present in the spectator or neutral area of a courtroom. If the *Flynn* decision is allowed to stand, the amici curiae respectfully submit that state court trial judges may be uncertain in this intermediate class of cases as to what security measures are permissible without risking reversible error. The administration of state criminal justice systems will be impeded if state court trial judges wishing to have a small but visible security force in a neutral area of the courtroom must, as the *Flynn* decision implies, hold formal hearings and make findings on the record before doing so.

In addition, as the petitioners point out in their petition for certiorari at page 26, the *Flynn* decision may prompt other defendants who have received otherwise error-free trials to file habeas corpus petitions claiming that the mere presence of uniformed security personnel at their trials—even if in a neutral area of the courtroom— violated their constitutional rights to fair trials. The amici curiae respectfully submit, that given the established line of authority cited by the petitioners in their petition, such habeas corpus petitions would be dismissed on the merits. Nonetheless considerable judicial resources may be unnecessarily expended in addressing and deciding such habeas corpus petitions.

II.

The amici curiae fully endorse and support the argument in section II(A) of the petition for certiorari. State court factual findings are accorded a justifiably important status—a presumption of correctness—under 28 U.S.C. Section 2254(d). In a case like *Flynn*, where the trial judge conducted a voir dire of individual prospective jurors on the subject of the troopers' presence at the trial, the amici curiae agree with the petitioners that the state trial court was better situated than any federal appellate court to judge the impact, if any, of the troopers' presence on the jury in light of the layout of the courtroom, the distance between the troopers and their respective defendants, and the demeanor and reactions of the individual jurors during the voir dire. The state trial court's conclusion that the impartiality of individual jurors had not been affected—a conclusion affirmed by the Rhode Island Supreme Court—would appear to be a resolution of a historical factual question which was entitled to a presumption of correctness.

The amici curiae concur with the petitioners that the court of appeals should have deferred to the presumptively correct state courts' factual finding that the presence of the troopers did not affect the impartiality of the jury. Hence any alleged constitutional error under the circumstances should have been declared harmless beyond a reasonable doubt. The *Flynn* decision, the amici curiae respectfully submit, if allowed to stand, threatens to erode the power of state criminal trial courts to make unfettered factual determinations concerning the conduct of their trials.

Summary of Argument

The undersigned amici curiae, the Attorney Generals of their respective states, respectfully submit that the decision of the United States Court of Appeals for the First Circuit in *Flynn*, if allowed to stand, may have an adverse impact on the maintenance of courtroom order and security in state court criminal trials and also may undermine state and federal comity by encouraging federal court intrusions into the fact finding province of state court trial judges.

Conclusion

For all the foregoing reasons, the amici curiae respectfully request that this Court grant the petition for writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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PETITIONER'S

BRIEF

No. 84-1606 (3)

In The

Supreme Court of the United States

October Term, 1984

TERRANCE HOLBROOK AND JOHN MORAN,

Petitioners,

v.

CHARLES FLYNN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

Did the United States Court of Appeals for the First Circuit, in reviewing a petition for habeas corpus, err in disregarding state court factual determinations and in holding that the presence of four uniformed policemen, wearing holstered pistols, in the spectator section of the courtroom during the trial of the defendant Flynn and his five co-defendants, denied Flynn his constitutional right to a fair trial?

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Printing of the joint appendix has been deferred pursuant to Rule 30.4

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CITATION TO THE OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals was included in Appendix A to the Petition for Certiorari. The opinion is also reported as *Flynn v. Holbrook*, 749 F.2d 961 (1st Cir. 1984). The decision of the United States District Court was reproduced at Appendix B of the Petition. That decision is reported at 581 F. Supp. 900 (D.R.I. 1984). The denial of Flynn's direct appeal was set out in Appendix C of the Petition for Certiorari. That decision is reported *sub nom. State v. Byrnes*, 433 A.2d 658 (R.I. 1981).

—o—

JURISDICTION OF THE COURT

This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the First Circuit (annexed as Appendix D of the Petition herein) was entered on December 7, 1984. A timely petition for rehearing *en banc* was denied in an order dated January 11, 1985. A copy of said order was set out in Appendix E of the Petition for Certiorari.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent portions of the following constitutional provisions were previously set out in the Petition for Certiorari:

U.S. Const Amend. 6

U.S. Const. Amend, 14, § 1

Pertinent portions of the following federal statutes were set out at Appendix H to the Petition for Certiorari:

28 U.S.C. § 2245

28 U.S.C. § 2254

Pertinent portions of the following shall be set out in the joint appendix, printing of which has been deferred pursuant to Rule 30.4:

28 U.S.C. § 2243

1972 R.I. Pub. L. ch. 163, § 1 (codified at R.I. Gen. Laws (1984 Reenactment) § 42-56-3).

1976 R.I. Pub. L. ch. 259, § 1 (codified at R.I. Gen. Laws (1984 Reenactment) § 42-56-3).

R.I. Const. Art. I, § 9

R.I. Gen. L. 1956 (1969 Reenactment) § 10-9-32

STATEMENT OF THE CASE

A. Factual Background

On August 14, 1975, a group of masked men robbed Bonded Vault, Inc., a safety deposit vault located on Cranston St. in the City of Providence, Rhode Island. Two of the robbers, Joseph Danese and Robert Dussault, agreed to testify against their fellow robbers. As a result of a protracted trial including the testimony of Danese and Dussault, Charles J. "Chuckie" Flynn [hereinafter "Flynn" or "defendant"], and two accomplices were convicted of multiple counts including kidnapping, armed

robbery, and conspiracy.[1] According to Danese, Flynn had conducted several meetings at a house on Golf Avenue in East Providence. At each of these meetings, which began in July of 1975, Danese and other robbers were briefed as to their prospective roles. (Tr. 1571-77) The robbery was scheduled to occur on Wednesday, August 13, 1975. Danese was to serve as Flynn's driver on the job. On the Monday before the planned date, Flynn and Danese drove to the location of the Bonded Vault warehouse. (Tr. 1580-81) When Wednesday arrived, however, Flynn delayed the job to the next day. (Tr. 1581)

On the morning of Thursday, August 14, 1975, Danese and Flynn left Flynn's Golf Avenue house at approximately 7:30 a.m. (Tr. 1590) Flynn had a gun in his possession. Together they drove to a location a few blocks away from the Bonded Vault warehouse. (Tr. 1601) Danese parked his car and the pair walked to a green van parked outside of the warehouse, where they met the other members of the team, including Dussault and Byrnes. (Tr. 1613-15) Flynn led the group to the vault, where they encountered an individual whom Flynn ordered to open the vault. (Tr. 1617-19) Flynn threatened to shoot

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[1] Flynn was convicted on fifteen separate counts. In particular, he was convicted of assault with a dangerous weapon and unlawful possession of a firearm. Together with Ralph "Skippy" Byrnes, Flynn was convicted of four counts of robbery, five counts of kidnapping, and one count each of unlawful entry, possession of burglary tools, possession of firearms and conspiracy. John Ouimette was convicted of one count of conspiracy and one count of aiding and abetting. Three other individuals—who were tried together with Flynn, Ouimette, and Byrnes—were found not guilty. *State v. Byrnes*, 433 A.2d 658 (R.I. 1981). Two additional suspects, Robert Macaskill and Lawrence Lanou, remained at large at the time of the trial of this case. *See State v. Macaskill*, 475 A.2d 1024, 1025 (R.I. 1984).

the man if the alarm went off. (Tr. 1619) The group proceeded to open the numerous safety deposit boxes within the Vault, removing therefrom various currency, coins, jewelry, and other items. (Tr. 1619) When the boxes were emptied, Danese retrieved his car and drove Flynn back to the Golf Street house. (Tr. 1626-31) At this location the proceeds of the robbery were inventoried and divided. (Tr. 1647) It appeared that roughly seven hundred thousand dollars ($700,000.00) in large bills had been taken. (Tr. 1648) Smaller bills and other items such as jewelry and coins were neither counted nor divided at this time. (Tr. 1649) From the large bills only, each of the robbers was allotted a share of approximately sixty-four thousand dollars ($64,000.00). (Tr. 1649) The smaller bills, jewelry, and other valuables—estimated by one of the robbers at over a million dollars—were to be divided later. (Tr. 1649, 1670)

The robbery occurred in mid-August. By September, public attention had focused upon Robert Dussault as a suspect in the robbery. (Tr. 1664) Danese testified that by September other members of the group were concerned for Dussault's predicament. In particular, they were aware that Dussault had gone through much of his money and that he might therefore need their assistance should he be arrested and charged with the robbery. (Tr. 1665) Moreover, reports had been published in the press to the effect that Dussault was negotiating with the authorities for some form of assistance in exchange for his testimony about the robbery. (Tr. 1664) At a meeting with Dussault in October, Flynn urged him to remain in Rhode Island. (Tr. 1675) Flynn arranged again to meet with Dussault, who by November of 1975 had ignored Flynn's suggestion

and moved to Las Vegas. (Tr. 1681-83) Danese and Byrnes went to Las Vegas to join Flynn in his encounter with Dussault. Byrnes was instructed to bring a gun with him for the meeting. At this meeting Flynn pointed out to Dussault that each of the other robbers would be willing to contribute to Dussault's defense. (Tr. 1689) Dussault agreed that it was important to protect the other members of the gang from any detection. Dussault, however, resisted Flynn's attempts to persuade him to return to Rhode Island. (Tr. 1690)

Dussault eventually turned State's evidence and testified against his co-conspirators. Together with Danese, his testimony formed the crucial link in the prosecution's case against the robbers. In addition to the testimony of Dussault and Danese, an employee of Bonded Vault had observed Flynn brandishing a gun during the robbery and was able to identify Flynn as one of the robbers. The employee testified that she saw Flynn unmasked at several points during the robbery. (Tr. 947) She positively identified Flynn as the man who held the gun during the robbery.

B. Facts Regarding Courtroom Security

Flynn and his five co-defendants had been ordered held without bail, and were therefore in the custody of the state warden. The case came on for trial in Providence County Superior Court, before the Honorable Anthony A. Giannini. When jury selection began in this case, Flynn and his co-defendants complained about the presence of uniformed State Police officers seated in the courtroom. These officers had been detailed to assist

Department of Corrections personnel in maintaining custody of the defendants during the trial. The record indicated that during the course of the trial, the troopers were located either in the front row of the spectator section or in the back row of the courtroom. (Tr. 71, 524) The trial justice refused to exclude the troopers from the courtroom. The defendants sought extraordinary relief in the Rhode Island Supreme Court by way of a petition for certiorari. That court initially denied Flynn's petition. *State v. Byrnes,* 355 A.2d 411 (R.I. 1976) (*Byrnes I*). Prior to the commencement of trial, however, the Rhode Island Supreme Court reconsidered the petition and directed the trial justice to conduct an evidentiary hearing with regard to the presence of the troopers. *State v. Byrnes,* 357 A.2d 448 (R.I. 1976) (*Byrnes II*).

In response to the mandate of the Supreme Court, Justice Giannini conducted an extensive evidentiary hearing. (Tr. 114) Robert Melucci testified that as the principal officer of the committing squad, it was his duty to transport prisoners to court and to maintain custody during trials and hearings.[2] (Tr. 114) Officer Melucci stated

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[2] The committing squad is a group of uniformed officers who serve within the Rhode Island Department of Corrections. The committing squad was formally established by the Rhode Island General Assembly in 1972. 1972 R.I. Pub. L. ch. 163, § 1 (codified at R.I. Gen. Laws (1984 Reenactment) § 42-56-3). Members of the committing squad, like members of the United States Marshal Service, are clearly officers of the Executive Branch of government. *See Garland v. Sullivan,* 737 F.2d 1283 (3d Cir. 1984) (Becker, J., concurring) (United States Marshals perform services for the Judicial Branch; they remain within the domain of the Executive Branch), *cert. granted sub nom. Pennsylvania Department of Corrections v. United States*

(Continued on following page)

that there were eleven committing squad officers assigned to the Providence Superior Court. Melucci testified that in order to assure custody, the committing squad attempted to maintain a standard ratio of two officers per prisoner. (Tr. 121) During the pendency of this trial before Justice Giannini, Melucci said, Justice Fazzano was conducting a trial in another courtroom with three defendants. (Tr. 116) At the same time Justice McKenzie was conducting a trial with two defendants. (Tr. 116). Mel-

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(Continued from previous page)

Marshal Service, 105 S. Ct. 1166 (1985). The duties of the committing squad were specifically set out by the Legislature as follows:

> Sec. 42-56-3 . . . .
>
> (e) All functions and duties of the committing squad are as follows:
>
> a. To be responsible for the custody and safety of prisoners when transporting them to and from all court sessions.
>
> b. To supervise the conduct of, maintain order and discipline among prisoners.
>
> c. To have custody of prisoners while detained in a courthouse, and during the court's hearing of their case.
>
> d. To transport prisoners from the courts to the designated place of detention.
>
> e. To be responsible for the safety and welfare of prisoners in custody.
>
> f. To carry firearms as prescribed.
>
> g. The members of the committing squad shall have the powers of sheriffs and deputy sheriffs. 1972 R.I. Pub. L. ch. 163, § 1 (codified at R.I. Gen. Laws (1984 Reenactment) § 42-56-3).

The name of the committing squad has been changed to the "Rhode Island State Marshals." 1976 R.I. Pub. L. ch 259, § 1 (codified at R.I. Gen. Laws (1984 Reenactment) § 42-56-3).

ucci had assigned five officers to the three defendants in Judge Fazzano's courtroom and three members of the committing squad to Judge McKenzie's. (Tr. 116) This left three officers available for Justice Giannini's courtroom, where six defendants were on trial. (Tr. 119) Melucci determined that such a ratio—where defendants outnumbered security personnel—was professionally unacceptable. (Tr. 119) Given the likelihood that this trial would last an extended period, Melucci saw two options: He could either close down all other criminal courtrooms and assign his full detail to Justice Giannini's courtroom, or he could seek temporary assistance from some other security agency. (Tr. 121) Prior to trial Melucci had addressed this problem to Justice Fazzano, the Superior Court Justice in charge of the criminal calendar in Providence County. (Tr. 124) Justice Fazzano requested the assistance of the Rhode Island State Police to supplement the committing squad detail in Justice Giannini's courtroom. (Tr. 123) Melucci testified that without the assistance of the State Police he could not maintain the proper ratio of officers to prisoners. In such a situation Melucci, as the officer charged by statute with maintaining custody of the defendants, stated that he could not permit the defendants to enter the courtroom. (Tr. 119)

Major Lionel Benjamin of the Rhode Island State Police testified that the only officers available to assist the committing squad were members of his uniform division. (Tr. 140) He testified that members of the uniform division were required to work in uniform at all times. Benjamin reported that on one occasion in the past he had briefly assigned non-uniform work to a member of the uniform division. This assignment had nearly re-

sulted in a labor dispute. Benjamin did not wish to risk such a protracted dispute in connection with the lengthy trial of this case. (Tr. 144) Moreover, State Police officers were not permitted to remove their weapons while on duty. Major Benjamin stated that if the court ruled that troopers could not appear in uniform or with weapons, he would withdraw his men from the committing squad detail. (Tr. 161) The result of this testimony was clear. The committing squad required assistance. The only form of assistance available was uniformed State Police officers.

In addition to this evidentiary nearing, Justice Giannini conducted an extensive voir dire of the jurors to determine whether the presence of troopers would interfere with the defendants' rights. (Tr. 84) The judge clearly informed defense counsel that any juror who exhibited bias on this point would be excused for cause. (Tr. 84)

As a result of these extensive pre-trial proceedings, Justice Giannini issued a careful bench decision regarding the presence of the troopers at defendant's trial. (Tr. 219-34) The judge noted first that the issue of security related primarily to the fact that defendants were being held without bail.[3] (Tr. 224) As such, it was the respon-

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[3] Because these defendants were in the custody of the warden, their presence at trial was effectuated by means of court process. The attendance of prisoners at trial is obtained by use of a writ of habeas corpus ad prosequandum. This writ is authorized by R.I. Gen. L. 1956 (1969 Reenactment) § 10-9-32. Although the writ commands the warden to produce the body of the prisoner for purposes of court proceedings, by statute the warden retains custody of the prisoner even while court is in session. R.I. Gen. Laws (1984 Reenactment) § 42-56-3(e) (committing squad, as agent of Department of Corrections, retains custody of prisoner during court hearing). *See generally* note 2 *supra* (discussing duties of committing squad).

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sibility of the warden to see that they were reasonably confined. (Tr. 225) In measuring reasonableness, the judge referred to the testimony of Officer Melucci, who stated that the normal ratio of officers to defendants was two-to-one. The court noted in addition that the State Police officers did not come in physical contact with the defendants. Finally, the Court found *as a matter of fact* that the state police officers were necessary to maintain proper courtroom security:

> "[I]t is the responsibility of the warden and his delegates, the members of the committing squad, to see to it that these defendants are safely transported to court, are kept in the courtroom in the course of the trial, and safely returned to the adult correctional institutions at the conclusion of the day's proceedings. *And it is clear to the court from this evidence that the committing squad is unable and incapable, with the number of personnel that they have at their command, to accomplish that task;* that they have called upon, thru [sic] Justice Fazzano, the Department of

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The fact that these defendants were held without bail should not be confused with situations where defendants are unable to afford bail. *See Estelle v. Williams,* 425 U.S. 501, 505-06 (practices that impose special conditions on defendants who are unable to raise bail present special problems of equal protection). In Rhode Island, criminal defendants who face sentences of less than life in jail have a constitutional right to be "bailed by sufficient surety." R.I. Const. Art. I, § 9. Even in the case of a capital crime, the defendant is entitled to a hearing to determine whether discretionary bail should be granted. The law in Rhode Island is clear; bail is to be used only as a tool to insure the presence of the accused at trial. *Lemme v. Langlois,* 104 R.I. 352, 244 A.2d 271 (1968). A defendant may be held without bail only upon a finding that it is required to assure his attendance at trial. Thus, under state law, the fact that these defendants were held without bail was clearly predicated upon a subsidiary finding that their detention was necessary.

> State Police, and the Department of State Police are here primarily as delegates of the warden of the adult correctional institutions." (Tr. 228-29) (emphasis added)

The court specifically found moreover, that insufficiencies in the ranks of the committing squad necessitated the presence of State Police officers in the courtroom. (Tr. 229)

The trial justice went on to consider the effect of the presence of these officers upon the jury. The Court noted that fifty-four prospective jurors had been asked whether the presence of the troopers would effect their judgment. (Tr. 230) In summarizing the voir dire examination, Justice Giannini stated:

> "[N]one of the persons who were examined created any inference of guilt in their mind with respect to these defendants. And their responses as to the purpose for the state troopers being here lends substance and credibility to what these prospective jurors had to say.
>
> "I am firmly convinced, and I find on this testimony of the jurors, *especially with respect to the jurors we have in this box,* that armed state troopers in uniform, in this courtroom, has no effect whatsoever upon the constitutional rights of these defendants." *Id.* at 233-34 (emphasis added).

As a result of the ruling of the trial justice, the state troopers were permitted to remain in the courtroom. According to the record, they were located at various times either in the first row of the spectator section or in the back row of seats. (Tr. 71, 524) The record reflects further, at least at one point during the trial, that there were four committing squad officers in the courtroom and three state police officers. (Tr. 109).

Flynn and two of his codefendants were convicted and sentenced.[4] On direct appeal, the Rhode Island Supreme Court held that the trial justice had not abused his discretion in permitting the troopers to remain in the courtroom during the pendency of the trial. *State v. Byrnes,* 433 A.2d 658, 663 (R.I. 1981) (*Byrnes III*). The instant proceedings were commenced by way of a petition for habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the District of Rhode Island. That court, Hon. Bruce M. Selya, denied Flynn's petition on February 24, 1984. *Flynn v. Holbrook,* 581 F. Supp. 990 (D.R.I. 1984). Flynn appealed to the United States Court of Appeals for the First Circuit. On December 7, 1984, in an opinion by Senior Circuit Judge Bailey Aldrich, that court reversed the judgment of the District Court and ordered issuance of a writ of habeas corpus. *Flynn v. Holbrook,* 749 F.2d 961 (1st Cir. 1984). The instant petition for certiorari ensued and was granted by this Honorable Court on June 24, 1985. 105 S. Ct. 3499 (1985).

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SUMMARY OF ARGUMENT

In essence, the United States Court of Appeals for the First Circuit concluded that the presence of uniformed State Police officers denied defendant Flynn a fair trial by interfering with the presumption of innocence. *Flynn v. Holbrook,* 749 F.2d at 965. The Petitioners respectfully submit that this decision is erroneous for several reasons.

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[4] Three defendants who were tried together with Flynn were found not guilty by the jury. *State v. Byrnes,* 433 A.2d 658 R.I. 1981).

First, the Petitioners submit that the First Circuit erroneously refused to adhere to factual findings of the Rhode Island state courts as required under 28 U.S.C. § 2254(d). This Court has consistently held that a federal habeas court is bound by the prior factual findings of a state court. *E.g., Patton v. Yount,* 104 S. Ct. 2885 (1984); *Rushen v. Spain,* 104 S. Ct. 453 (1984); *Marshall v. Lonberger,* 103 S. Ct. 843 (1983); *Sumner v. Mata,* 449 U.S. 539 (1981). Despite the clarity of the law on this point, the First Circuit simply declined to follow factual findings of two Rhode Island state courts, which findings were amply supported by the record. In addition, the First Circuit made wholly unsupported factual findings of its own. The First Circuit's decision not to adhere to prior factual findings—and its failure to delineate any basis for its refusal—constitutes clear reversible error.

The Petitioners suggest that the refusal of the First Circuit to accord due weight to state court factual determinations constitutes a serious breach of the federal-state comity inherent in habeas corpus jurisprudence. Equally troubling, however, is the fact that the legal analysis undertaken by the First Circuit connotes an improper desire to supervise the state courts of Rhode Island. The court criticized Justice Giannini for his alleged failure to follow the remand order of the Rhode Island Supreme Court. The First Circuit also criticized the trial judge for failing to consider other alternative methods of security. Remarkably, the court implied that had committing squad officers —as opposed to troopers—been utilized, no constitutional problem would have occurred. Petitioners respectfully suggest that this is a classic supervisory power analysis. Whatever the merits of the philosophical or jurispruden-

tial underpinnings of the First Circuit's analysis, it fails to address the constitutional issues necessary for the decision of a habeas corpus case. It should be noted, moreover, that even if the First Circuit's view of courtroom security were correct, the procedure followed by Justice Giannini seems to have addressed all of the appropriate considerations voiced by the First Circuit. The First Circuit, however, either ignored or overlooked this fact in its rejection of Justice Giannini's decision.

Indeed, Petitioners submit that the proper scope of inquiry was fully set out by this Court in *Estelle v. Williams,* 425 U.S. 501 (1976), and its progeny. As will become clear *infra,* Justice Giannini exercised his discretion in a manner consistent with this Honorable Court's holding in *Williams.* Moreover, even if the First Circuit were correct in concluding that the presence of troopers created a potential for prejudice, that court failed to apply the proper standard of review in determining whether the defendant was denied a fair trial. As Petitioners demonstrate *infra,* the central question is whether defendant Flynn received a fair trial. In making this determination, a reviewing court is required to undertake a "totality of the circumstances" approach. By specifically refusing to consider many of the circumstances of this trial, the First Circuit simply failed to apply the law as promulgated by this Court. If proper consideration is given to all the circumstances of the trial, Petitioners respectfully submit that Flynn would not be entitled to habeas corpus relief.

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ARGUMENT

I. The First Circuit impermissibly ignored factual findings of the courts of the State of Rhode Island.

The instant proceedings were commenced by way of a habeas corpus petition pursuant to 28 U.S.C. § 2254. That statute provides that factual findings of state courts are entitled to a presumption of correctness. *Id.* § 2254 (d). Petitioners submit that the First Circuit failed to apply this statutory presumption. Moreover, a careful review of the First Circuit's opinion reveals that the court reached factual conclusions that were clearly contrary to the evidence in the record of this case. These errors alone require reversal of the First Circuit's decision.

This Court has clearly held that factual issues—including those attendant to juror impartiality—are entitled to the statutory presumption of correctness. *Rushen v. Spain,* 104 S. Ct. 453, 456-57 (1983). Indeed, this Court in *Rushen* recognized that the presumption is especially appropriate in cases involving jury voir dire, because the state courts are in a better position than the federal habeas courts to evaluate juror impartiality. *Id.* This Court applied similar reasoning in *Patton v. Yount,* 104 S. Ct. 2885 (1984). In *Patton* the trial court had made specific findings of fact regarding the effect of pretrial publicity on the partiality of the jurors.[5] These factual findings were

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[5] The defendant in *Patton v. Yount,* 104 S. Ct. 2885 (1984), had been tried and convicted in state court for a highly publicized murder. A state appellate court reversed, holding that the defendant's confession should have been suppressed. Prior to the second state trial, the court conducted voir dire hearings

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based upon the court's extensive pre-trial voir dire examination of prospective jurors. This Court concluded that these findings were entitled to the statutory presumption of correctness set out at 28 U.S.C. § 2254(d). The *Patton* Court reasoned that jury voir dire testimony was especially proper subject matter for the statutory presumption, because of the manner in which a trial judge observes the demeanor and credibility of the potential juror:

> "It is fair to assume that the method we have relied upon since the beginning, *e.g. United States v. Burr*, 25 F. Cas. No. 14,692g, p. 49, 51 (C.C.D. Va. 1807) (Marshall, C.J., usually identifies bias. Second, the determination is essentially one of credibility and therefore largely one of demeanor. As we have said

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in order to assure that the potential jurors for the second trial would not be influenced by the original confession and guilty verdict. Defendant sought a change of venue. The trial judge rejected this notion, concluding as a matter of fact on the basis of the jury voir dire that the jurors selected had formed no fixed opinions about the case. The defendant was again convicted and the state appellate court affirmed. Defendant then sought habeas corpus relief in federal court. The United States District Judge denied the petition, concluding that the state court had correctly found the jurors to be impartial. The United States Court of Appeals for the Third Circuit reversed. The court examined the voir dire testimony of the jurors and rejected the state court's conclusion that the jurors were impartial. Instead, based upon its reading of the record, the Court of Appeals concluded that the juror's responses had been equivocal. On this record the court of appeals concluded that the defendant had been denied a fair trial.

This Court granted certiorari and reversed the decision of the Court of Appeals. In examining the Court of Appeals' decision, this Court concluded that the court had impermissibly rejected the factual conclusions of the state courts regarding juror bias. The state courts had made clear and decisive findings with regard to the potential bias of the jurors. This Court concluded that these findings were entitled to the statutory presumption of correctness set out at 28 U.S.C. § 2254(d).

> on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to "special deference." *E.g., Bose Corp. v. Consumers Union of U.S.*, 104 S. Ct. 1949 (1984). The respect paid such findings in a habeas proceeding certainly should be no less . . ." *Patton v. Yount*, 104 S. Ct. at 2892 (citations omitted).

The Court having decided to apply the presumption of correctness to the state factual finding, the only proper inquiry for federal review was whether there was fair support in the record for the finding of the state court. In *Patton* this Court recognized that statements by jurors are frequently ambiguous or contradictory. The Court reasoned that unlike other witnesses, jurors do not expect to testify and thus take the witness stand without the benefit of prior preparation for testimony. Moreover, because jurors are chosen from the community at large, they bring with them a wide variety of education and experience that does not always guarantee the ability to speak clearly or articulately. Nevertheless, the Court in *Patton* recognized that trial judges are highly experienced in the selection and examination of jurors:

> "Every trial judge understands this, and under our system it is that judge who is best situated to determine the competency to serve impartially. The trial judge properly may choose to believe those statements that were most fully articulated or that appear to have been least influenced by leading." *Id.* at 2893.

This Court in *Patton* clearly held that a federal habeas court must apply the statutory presumption of correctness to state court factual findings regarding juror expressions of impartiality. Conversely, in the instant case, the First Circuit simply rejected as meaningless the extensive jury voir dire that occurred. 749 F.2d at 965. Moreover, the

court completely disregarded the finding of the trial justice that insufficiencies in the ranks of the committing squad necessitated the presence of state troopers to maintain a routine level of security. In so doing, the First Circuit neither cited nor distinguished section 2254(d). *See Sumner v. Mata,* 449 U.S. 539, 547 (1981) (circuit court failed even to refer to statutory presumption). This failure alone would seem to require reversal of the First Circuit's decision. This Court in *Mata* specifically directed that lower federal courts, when rejecting state court factual findings, must delineate specific reasons with reference to section 2254(d).[6] The First Circuit, instead of

[6] This Court in *Sumner v. Mata,* 449 U.S. 539 (1981), specifically stated that lower federal courts must state their reasons for setting aside state court findings:

"When it enacted the 1966 amendment to 28 U.S.C. § 2254, Congress specified that in the absence of the previously enumerated factors one through eight, the burden shall rest on the habeas petitioner, whose case by that time had run the entire gamut of a state judicial system, to establish 'by convincing evidence that the factual determination of the State court was erroneous.' . . . Thus, Congress meant to insure that a state finding not be overturned merely on the basis of the usual 'preponderance of the evidence' standard in such a situation. In order to ensure that this mandate of Congress is enforced, we now hold that a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.' Such a statement tying the generalities of § 2254 to the particular facts of the case at hand will not, we think, unduly burden federal habeas courts even though it will prevent the use of the 'boilerplate' language to which we have previously adverted. Moreover, such a statement will have the obvious value of enabling courts of appeals and this Court to satisfy themselves that the congressional mandate has been complied with." *Id.* at 551-52 (citations omitted).

setting forth any basis for its rejection of the state courts' findings, focused upon alleged ambiguities in the statements of some of the prospective jurors. 749 F.2d at 965. Contrary to the rule announced by this Court in *Patton,* the First Circuit rejected Justice Giannini's first-hand ability to weigh the value of these statements. Characterizing the juror's statements of impartiality as "unacceptable," *id.,* the First Circuit rejected Justice Giannini's factual finding that the troopers had no influence.

Thus, the First Circuit seems to have evaluated and rejected the credibility of these jurors—from a temporal and geographical distance—in contravention of this Court's prior case law. *See Marshall v. Lonberger,* 103 S. Ct. 843, 851 (1983) (federal habeas court has no power to redetermine credibility of witnesses previously observed by state trial court). The First Circuit was apparently equally unimpressed with the finding of the Rhode Island Supreme Court based upon the voir dire. *Cf. Sumner v. Mata,* 449 U.S. at 545 (factual findings by state appellate court entitled to same degree of deference as trial court's findings). Justice Giannini and the Rhode Island Supreme Court considered a jury voir dire as the fundamental and essential procedure for determining the impact of the troopers. The First Circuit, on the other hand, rejected the notion that a jury voir dire on this issue could serve any useful purpose. *Cf. Sheppard v. Maxwell,* 284 U.S. 333, 358 (1966) (criticizing trial judge for failure to question jurors on possible effects of pretrial publicity). Indeed, the First Circuit seems to have imposed an irrebutable presumption with regard to jurors who testified that the troopers would not effect their judgment:

> "Even if all jurors had indicated an unreserved opinion that the troopers' presence would not affect them, such expression, on a case as extreme as this, where there was no need to rely on it, is totally unacceptable." 749 F.2d at 965.

This conclusion by the First Circiut rejects the clear and unambiguous findings of the trial judge and the state appellate court. Under 28 U.S.C. § 2254(d), the First Circuit did not have the freedom to reject these factual findings, absent a collateral finding that they were unsupported by the record.[7] *Sumner v. Mata, supra.* Moreover, the court rejected sub silentio the trial judge's factual conclusion that the troopers were reasonably necessary to maintain court security. The failure to accord these factual findings their appropriate weight is reversible error.

Even assuming *arguendo* that these state court factual findings do not merit the statutory presumption of correctness afforded by section 2254(d), Petitioners submit that the First Circuit's issuance of the writ was nevertheless erroneous. This Court has clearly held that even after a habeas petitioner overcomes the presumption of correctness, he must then bear the burden of showing by clear and

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[7] Petitioners respectfully submit that the findings of the trial justice are amply supported in the record. An examination of the transcript reveals an extensive summary by the trial justice of the voir dire that occurred. His recounting of the statements by the prospective jurors clearly indicates that there was no reason to believe that they would be influenced by the presence of the state troopers. Some statements by prospective jurors might arguably be characterized as ambiguous. Nevertheless, as this Court has held, the trial justice was in the proper position to accord these statements their proper weight. *See Patton v. Yount,* 104 S. Ct. 2885, 2893 (1984) (despite presence of ambiguity in juror's statements, trial judge in proper position to determine bias or prejudice).

convincing evidence that the state court's findings were erroneous. *Sumner v. Mata,* 449 U.S. at 551-52; *Johnson v. Zerbst,* 304 U.S. 458, 468-69 (1938) (habeas petitioner has burden of establishing his right to relief). It would not appear that Flynn has even purported to bear that burden in this case. The First Circuit's issuance of the writ without requiring such a showing is plainly wrong and requires reversal. Indeed, had the First Circuit reached a bona fide conclusion that the state court's findings lacked support, the case should have been remanded for further hearings. A remand would have permitted the district court to conduct a hearing pursuant to *Townsend v. Sain,* 372 U.S. 293 (1963).

In addition to its failure to comply with the requirements of Section 2254(d), the First Circuit made independent factual findings that were directly contradictory to evidence in the record. In particular, the First Circuit stated:

> "From the start of the trial defendants were *brought to court accompanied by* four uniformed, and conspicuously armed, state troopers . . . " *Flynn v. Holbrook,* 749 F.2d at 962 (emphasis added).

The First Circuit's assertion that the defendants were "brought to the court" by the State Police officers is simply wrong. Petitioners submit that nothing on this record supports such a claim. In fact, the record clearly states that throughout the trial the troopers were to have no physical contact with the defendans. (Tr. 141) Precisely because they were armed, these troopers were not permitted by their committing squad supervisors to escort prisoners to and from the cell block. (Tr. 130, 141) In light of this clear testimony on the record, the First Cir-

cuit's statement that the troopers "brought" the defendants to the courtroom is simply a gratuitous and unwarranted assertion. This impropriety alone requires reversal of the First Circuit's decision.

As the Petitioners argue elsewhere in this brief, a proper review of the actual record fully supports the actions of the trial judge. Even if this Court rejects Petitioners' arguments on this point, however, Petitioners respectfully suggest that issuance of writ of habeas corpus requiring a new trial is not the appropriate disposition of this case. The First Circiut seems to have been dissatisfied with the pre-trial evidence adduced by the trial justice in support of the presence of the troopers. Rather than granting Flynn a new trial on this basis, Petitioners would request a remand to permit the lower court to develop a proper evidentiary record.[8] Such a result is espe-

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[8] A federal habeas court is empowered, pursuant to 28 U.S.C. § 2243, to "dispose of the matter as law and justice requires." *Id.* This provision would seem to permit the habeas court to require an evidentiary hearing that addresses the factual issues determined by the habeas court to be essential to support the legal conclusion reached by the state court. This approach was suggested in *Warren v. Harvey*, 472 F. Supp. 1061 (D. Conn. 1979), *aff'd*, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980). In that case a committed insanity acquittee claimed that he was being impermissibly detained in a state mental facility. In particular, the individual claimed that the state had improperly allocated to him the burden of proving his ability to return safely to the community. The court rejected the petitioner's claim. In so doing, however, the court noted that the only practical relief it could afford would be a new evidentiary hearing at which the state could develop its evidence in light of the proper burden of proof. *See Byrd v. Smith*, 407 F.2d 363, 366 n.8 (5th Cir. 1969) (federal courts have power to fashion remedy that is appropriately tailored to requirements of justice).

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cially practical in light of the length of the trial and the number of years that have passed since the robbery.

II. The Decision of the First Circuit Represents an Improper Exercise of Supervisory Jurisdiction.

The Petitioners respectfully submit the First Circuit in this case addressed issues that were outside the scope of its habeas corpus jurisdiction. In essence, the court was concerned with matters that properly fall only within the supervisory power of a federal court. This Court has made clear that when issues do not present constitutional problems, federal courts have no supervisory jurisdiction over state trial courts. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974) (errors at trial that might warrant exercise of supervisory power by appellate court do not always rise to the level of constitutional violations).

The supervisory nature of the First Circuit's decision is apparent upon careful analysis. For example, the First Circuit seemed to recognize that there was a shortage of personnel in the regular committing squad. Flynn's defense counsel had previously suggested that this shortage could have been corrected by shifting the complement of state troopers to another courtroom and replacing them at

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Alternatively, 28 U.S.C. § 2245 would appear to permit the Petitioners to obtain a certificate from the trial justice setting out additional reasons for his decision to permit the troopers to remain in the courtroom. Petitioners respectfully submit that ample evidence exists on this record to support the trial judge's actions. In the event that this Court disagrees, Petitioners respectfully suggest that, in light of the length of the trial and the time that has passed since this crime, an opportunity to supplement this record would be consistent with the requirements of justice. See 28 U.S.C. § 2243.

the Flynn trial with officers of the committing squad. (Tr. 126) Apparently, security provided by officers of the committing squad was acceptable to defendant Flynn, while security provided by state troopers was not. The First Circiut seems to have adopted this view. *See* 749 F.2d at 962 (criticizing trial court for rejecting defendant's suggestion). The Petitioners recognize that there might be some *supervisory* rationale that would permit an appellate court to adopt such reasoning for trials in its courts. To prevail in federal court, however, a habeas petitioner must state his claim in federal constitutional terms. Flynn must thus demonstrate a distinction of *constitutional* dimensions between officers of the committing squad—whose presence was apparently acceptable—and officers of the state police.

In accepting Flynn's claim, the First Circuit seems to have recognized a distinction of *constitutional* magnitude between uniformed committing squad officers and uniformed state troopers. The Petitioners respectfully submit that this conclusion is simply erroneous. As this Court has pointed out on previous occassions, the proper inquiry for a federal habeas court is whether the course followed violated the constitution. *Donnelly v. DeChristoforo, supra.* The mere existence of some less intrusive alternative does not create a *per se* constitutional violation. Yet this seems to have been the primary basis for the First Circuit's decision. As this court has observed in a different context, "[a] creative judge engaged in post hoc evaluation," can almost always imagine some alternative method for obtaining the desired public protection goal. *See United States v. Sharpe,* 105 S.Ct. 1568, 1576 (1985); *United States v. Montoya de Hernandez,* 105 S. Ct.

3304, 3311 (1985). In this case the First Circuit clearly premised its criticism of Justice Giannini upon his failure to consider "less totalitarian alternatives." *See* 749 F.2d at 964. The mere fact, however, that court security might have been maintained through some less intrusive alternative does not render the method chosen unconstitutional. As this Court has pointed out in the Fourth Amendment context:

> "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *United States v. Sharpe,* 105 S. Ct. at 1576.

Petitioner submits that there are additional indicia that the First Circuit was actually engaged in a supervisory analysis when it reversed the decision of the District Court. For example, the First Circuit is highly critical of Justice Giannini's alleged failure to comply with the mandate of the Rhode Island Supreme Court. This is in reality a question of state law. In particular, the First Circuit suggested that the trial judge should have complied with the Rhode Island Supreme Court's allusion to standards for court security promulgated by the American Bar Association. The First Circuit, however, cannot criticize a state judge's alleged failure to follow these standards unless the standards are matters of constitutional mandate. After all, a federal habeas corpus court can only correct state court judgments that amount to errors of federal constitutional dimension. *See Carrizales v. Wainwright,* 699 F.2d 1053, 1054-55 (11th Cir. 1983) ("A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief . . ."); *Warren v. Harvey,* 472 F.Supp. 1061 (D. Conn. 1979), *aff'd,* 632 F.2d 925 (2d Cir.), *cert. denied,* 449 U.S. 902 (1980). *See gen-*

erally Donnelly v. DeChristoforo, 416 U.S. at 642 (not every trial error rises to level of constitutional deprivation). The alleged error in this case was not one of constitutional magnitude. There is no claim that the security measures interfered with the defendant's right to consult with his attorney. *Cf. Bitter v. United States,* 389 U.S. 15, 16 (1967) (mid-trial incarceration of defendant in distant facility impermissibly impeded his ability to consult with counsel). Nor does Flynn claim any improper contact between State Police personnel and the jurors who sat at his trial. *See Turner v. Louisiana,* 379 U.S. 466, 473-74 (1965) (defendant denied fair trial where deputy sheriffs who maintained custody of jury were also chief prosecution witnesses). Instead, the First Circuit seems to have concluded that the trial judge's failure to comply with the ABA standards amounted to a per se violation of the defendants' right to a fair trial. 749 F.2d at 963. The Petitioners respectfully submit that unless this Honorable Court is prepared to adopt the ABA standards as constitutionally required, this fundamental premise of the decision of the First Circuit must fall.

Moreover, even assuming that the trial justice was bound by the ABA standards, the Petitioners submit that the standards were met in this case. An examination of the standards and their accompanying commentary reveals that Justice Giannini was within the bounds of reason in permitting these security officers to remain. The relevant standard provides in pertinent part:

> "Defendants and witnesses should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he should enter into the record of the case the reasons therefore. Whenever physical restraint of a defendant or witnesses occurs in the presence of jurors trying the case, the judge should instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt." *American Bar Association, Standards for Criminal Justice, Trial by Jury,* § 4.1(c), at 91-92 (Approved Draft 1968).

Courtroom security is obviously designed to protect against perceived danger before it occurs. The authors of the standards specifically recognized that the trial judge must act in anticipation of problems and need not await the actual occurrence before imposing reasonable security measures. *Id.,* comments at 97. Moreover, the comments to this standard specifically define a defendant's record of violence or prior escape as proper criteria justifying restraint. *Id.* at 96 n.9. Because defendant Flynn had a record of violent crime and escape,[9] the standards would seem to permit some form of restraint in this case.

Thus, in the event that this Court were to adopt the ABA standards as a constitutional requirement, the Petitioners submit that the standards were complied with in this case. The fundamental premise of the First Circuit's decision—that there was nothing on the record to justify restraint—can only proceed from a refusal consider significant facts that were indeed on the record. Accordingly, the decision of the First Circuit must be reversed.

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[9] Flynn's violent criminal past became part of the record when he took the stand as part of the defense case. In particular, Flynn admitted to prior convictions for assault and battery (Tr. 2-894), impersonating a police officer (Tr. 2-896), and armed robbery while masked (Tr. 2-896). Flynn's trial attorney conceded at the sentencing hearing that his client was an escapee from a Massachusetts prison. (Tr. Feb. 8, 1977, at 22-23).

In reviewing the court security procedures in this case, the First Circuit engaged in a supervisory power analysis. Such an approach might be appropriate when reviewing a conviction from one of the federal district courts within the First Circuit. This analysis is highly improper in a case such as this one, where a federal habeas court is engaged in collateral review of a state court conviction. Because the First Circuit overstepped the proper bounds of habeas review, this Court must reverse the judgment granting Flynn's petition for habeas corpus.

III. The First Circuit Erred in Concluding that the Presence of State Troopers Denied Flynn a Fair Trial by Impinging upon his Presumption of Innocence.

A. The Presumption of Innocence.

The significance of the presumption of innocence in our criminal system cannot be gainsaid. This Court has recognized on numerous occasions that a defendant is constitutionally entitled to the presumption of innocence. Denial of the presumption results in an unfair trial, violative of the guarantees of the Sixth and Fourteenth Amendments. *See, e.g., Taylor v. Kentucky,* 436 U.S. 478 (1978); *Estelle v. Williams,* 425 U.S. 501 (1976); *Coffin v. United States,* 156 U.S. 432 (1895). In *Coffin,* this Court traced the historical derivation of the presumption of innocence from the biblical book of Deuteronomy,[10] through Greek

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[10] The Book of Deuteronomy might properly be regarded as the primary written version of the Judeo-Christian law. The Ten Commandments are set out in chapter five of Deuteronomy. *Deuteronomy* 5:6-21. The Ten Commandments, of course, are

(Continued on following page)

and Roman law, and into the English common law tradition.[11] 156 U.S. at 454-56. In *Estelle v. Williams, supra,* the Court recognized that the "atmosphere" of the trial may have an adverse effect upon the defendant's presumption of innocence.[12] The defendant in *Williams* was on trial in a Texas courtroom for assault with intent to commit murder. Williams had been unable to post bond and was therefore in custody awaiting trial. On the day of trial, Williams asked his jailer for permission to wear civilian clothes, which request was denied. The request was never brought to the attention of the judge who presided at Williams' trial. Williams was therefore presented to the jury in characteristic prison garb. Williams was convicted and

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a code of conduct rather than rules of procedure. Within Deuteronomy, however, are the beginning stages of the Anglo-American concept of fairness and due process of law. *See generally B. Anderson, Understanding the Old Testament* 133-35 (3d ed.1975) (Deuteronomic law is distinguishable from other early codes because of its humane nature). In particular, the roots of the presumption of innocence can be found in the repeated exhortation that reports of crime or immorality must be investigated with diligence before any punishment may be imposed. *Deuteronomy* 13:12-15; 17:2-6.

[11] One English commentator has suggested that in British law the presumption of innocence is more a desired goal than a practiced norm:

> "The fact simply is that the finger of suspicion is pointing against [the defendant]. We should, however, do everything possible to treat such a man as if he were innocent, *consistent with the demands of the public safety* and the due trial of the charge against him." *G. Williams, The Proof of Guilt* 151-52 (2d Ed. 1958) (emphasis added).

[12] This Court has examined trial "atmosphere" in other contexts. *See, e.g., Sheppard v. Maxwell,* 284 U.S. 333 (1966) ("circus" atmosphere generated by press and prosecutor rendered trial constitutionally unfair).

eventually sought habeas corpus relief in the United States District Court. The District Court denied relief, but the Court of Appeals for the Fifth Circuit reversed. On certiorari, this Court reaffirmed the role of the presumption of innocence as a basic and fundamental component of trials in our system of criminal justice. 425 U.S. at 503. To protect this important notion, judges must be cognizant of "factors that may undermine the fairness of the fact-finding process." *Id.* When a particular practice or procedure gives rise to the probability of weakening the presumption, a reviewing court must carefully scrutinize the practice and its probable effect on the factfinder. This evaluation calls upon the judicial exercise of "reason, principle, and common human experience." *Id.* at 504.

The analysis announced in *Williams,* however, does not stop at the point of measuring potential for prejudice. The Court suggested that even potentially prejudicial practices may be permitted if the practice furthers some essential state policy. As this Court had previously concluded in *Illinois v. Allen,* 397 U.S. 337 (1970), the use of leg irons or shackles might be appropriate to restrain a contumacious defendant if these devices implement the significant state interest in maintaining orderly proceedings in the courtroom.[13] Applying this utility analysis to

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[13] In *Illinois v. Allen,* 397 U.S. 337 (1970), the defendant was on trial in state court for armed robbery. The defendant apparently desired to represent himself during the trial. His conduct, however, was less than decorus. The defendant throughout the jury selection process exhibited a propensity for outbursts and insults. At one point he threatened the physical safety of the trial judge. The judge's response to this behavior

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the facts in *Williams,* the Court rejected the trial of defendants in prison garb. The use of jail clothing furthers no essential state policy. 425 U.S. at 505. Presumably the practice confers some slight degree of convenience upon prison officials. Such an inessential benefit, however, is simply incapable of outweighing the resultant harm to the presumption of innocense. Thus, the Court in *Williams*

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by defendant was to exclude him from the trial. The United States Court of Appeals for the Seventh Circuit held that continuation of the trial in the defendant's absence amounted to an error of constitutional dimensions. This Court reversed, in an opinion by Mr. Justice Black.

The Court noted first that the right to be present at trial is not absolute. Thus, the Court recognized that a trial judge has the discretion to fashion an appropriate remedy when a potentially unruly defendant threatens the continuation of proceedings:

> "No one formula for maintaining the appropriate courtroom atmosphere will be the best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 343-44.

In *Allen* the Court concluded that the trial judge had acted appropriately in excluding the defendant from the trial. The admittedly-drastic remedy of removing the defendant was appropriate, the Court reasoned, in a case where the defendant's conduct threatened the very administration of the ongoing trial. Without strictly endorsing the actions of the trial judge in *Allen,* this Court recognized the significant breadth of the trial judge's discretion to regulate the conduct of the trial before him. *Id.* at 347 (other proper solutions may have existed, but trial judge did not abuse discretion).

held that a criminal defendant may not constitutionally be compelled to attend his trial in prison garb.[14]

In *Taylor v. Kentucky*, 436 U.S. 478 (1978), this Court examined another aspect of the presumption of innocence. In *Taylor* the trial judge's failure to instruct the jury as to the defendant's presumption of innocence amounted to a violation of the defendant's right to a fair trial. The Court noted that the presumption of innocence is constitutionally mandatory. An instruction informing the jury of the existence and significance of the presumption, the Court reasoned, is an effective method of insuring the defendant the constitutional protections of the presumption. *Id.* at 485.

The *Taylor* Court's recognition of the efficacy of jury instructions did not, however, amount to a constitutional mandate that instructions on the presumption are obligatory in every case. The Court made this clear in *Kentucky v. Whorton*, 441 U.S. 786 (1979). In *Whorton* the Court held that the absence of instructions on the presumption of innocence does not necessarily require a new trial. Instead, the Court reasoned that a "totality of the circumstances inquiry" is appropriate to determine whether the defendant's presumption of innocence was safeguarded by other means:

> "[T]he failure to give a requested instruction on the presumption of innocence does not in and of itself

[14] The defendant in *Williams* had failed to alert the trial judge to his desire to be tried in civilian clothes. Because of this failure, this Court reasoned that defendant had not technically been compelled to face trial in prison garb. Accordingly, this Court held that habeas relief was unavailable. *Estelle v. Williams*, 425 U.S. at 512.

> violate the Constitution. Under *Taylor*, such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial." 441 U.S. at 798.

Thus, in determining whether the defendant's presumption of innocence was properly safeguarded, a reviewing court must look to the totality of the circumstances.[15] The focus of appellate inquiry is the trial as a whole. As this Court suggested in *Williams*, this process calls for the ex-

[15] This "totality" approach is consistent with the analysis utilized by this Court in analogous cases involving Sixth Amendment issues. For example, in *United States v. Agurs*, 427 U.S. 97 (1976), this Court considered whether the failure of the prosecutor to deliver unrequested materials to the defense counsel deprived the defendant of a fair trial. The information was arguably exculpatory within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963). The Court held that in reviewing such a problem, the proper approach is to determine whether the non-disclosed evidence was material to the case. The Court's analysis clearly entails a review of the entire record:

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be *evaluated in the context of the entire record*. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 112-13 (emphasis added).

Applying this standard in *Agurs*, the Court found that the withheld evidence was not sufficiently material to defendant's case to warrant a new trial. *See United States v. Bagley*, 105 S. Ct. 3375 (1985) (appropriate inquiry must focus upon whether there is "reasonable probability" that, but for alleged error, outcome of trial would have been different).

ercise of "reason, principle, and common human experience." *Estelle v. Williams,* 425 U.S. at 540. If, despite the alleged error, the reviewing court is satisfied that the trial and its outcome were fair, no new trial is necessary.

B. In Permitting the Troopers to Remain in the Courtroom, the Trial Justice Properly Adhered to the Principles of Estelle v. Williams.

Justice Giannini conducted an extensive voir dire hearing in order to determine whether the state troopers should remain in the courtroom. In particular, he took testimony from state officials charged with maintaining custody of prisoners. In addition he conducted a voir dire examination of the jurors to determine what impact the troopers would have upon the jury at the trial. As a result of these hearings, he was able to conclude that the troopers were reasonably necessary to maintain security in the courtroom. He also found as a fact that the jury selected would be in no way influenced by the presence of the troopers.

This analysis by Justice Giannini clearly complied with the requirements of *Estelle v. Williams, supra.* By recognizing that the presence of armed troopers gave rise to a potential for improper influence, Justice Giannini clearly demonstrated his sensitivity to the fairness of the fact-finding process. *Estelle v. Williams,* 475 U.S. at 503. He conducted an extensive voir dire to "evaluate the likely effects of [the] particular procedure. . ." *Id.* at 504. Justice Giannini heard the testimony of the officer charged with maintaining courtroom security in order to determine whether the presence of the troopers furthered any "essential state policy." *Id.* at 505. As a result of this

hearing, the court concluded that the troopers were necessary to maintain even minimal routine security standards. (Tr. 229) The Petitioners submit that this conclusion was proper and correct. Moreover, there was scant likelihood that these officers would unfairly prejudice the defendant. Other state and federal courts that have considered this issue have generally found little danger of prejudice inherent in the presence of uniformed security personnel.[16]

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[16] *See, e.g., Hardee v. Kuhlman,* 581 F.2d 330, 332 (2d Cir. 1978) (presence of security personnel did not require reversal); *Kennedy v. Cardwell,* 487 F.2d 101 (6th Cir. 1973), *cert. denied,* 416 U.S. 959 (1974) (permitting shackling of defendant); *Dorman v. United States,* 435 F.2d 385 (D.C. Cir. 1970) (stationing marshals behind defendant did not create prejudice); *Thomae v. State,* 632 P.2d 236 (Alas. App. 1981) (where no evidence that armed state trooper took any action in jury's presence that might prejudice defendant; no abuse of discretion in permitting trooper to be present); *Zant v. Gaddis,* 247 Ga. 717, 279 S.E. 2d 219, *cert. denied,* 454 U.S. 1037 (1981) (defendant is ordinarily entitled to trial free of excessive security; special circumstances may make such security justifiable); *Glidewell v. State,* 169 Ga. App. 858, 314 S.E. 2d 924 (1984) (presence of armed guards at robbery trial did not prejudice defendant); *State v. Broadway,* 440 So. 2d 828 (La. App. 1983) (presence of four uniformed guards at defendant's trial was permissible; defendant charged with violent crime—use of guards preferable to handcuffs or shackles); *Pedego v. Commonwealth,* 644 S.W. 2d 355, 357 (Ky. App. 1982) (defendant had previously been convicted of escape; no prejudicial error in allowing uniformed police officers in courtroom); *State v. Billaps,* 301 N.C. 607, 272 S.E. 2d 842 (1981) (where defendant had previously escaped from custody and only one bailiff was available to guard him, court did not err in permitting use of handcuffs); *State v. Gove,* 185 S.E. 2d 826 (S.C. 1971) (presence of 36 law enforcement officers in courtroom did not constitute abuse of discretion); *Smith v. State,* 667 S.W. 2d 836 (Tex. App. 1984) (presence of four to eight security personnel did not constitute extraordinary security procedure justifying new trial); *Banks v. State,* 643 S.W. 2d 129 (Tex. Cr. App.) *cert. denied,* 78 L. Ed. 2d 244 (1983) (defendant not prejudiced by use of uniformed security officers to accompany him in presence of jurors); *State v. Herzog,* 635 P.2d 694 (Wash. 1981).

Justice Giannini conducted a thorough voir dire examination of the jury in this case. The voir dire examination demonstrated that the jurors who were finally selected to sit at trial would in no way be influenced by the presence of these State Police officers.

The Petitioners submit that Justice Giannini complied fully with the analysis promulgated by this Court in *Williams.* This careful procedure should be contrasted with the failure of the First Circuit to apply the proper principles to the relevant facts. The First Circuit ignored the testimony of Officer Melucci from the committing squad. Completely absent from the First Circuit's opinion is any acknowledgement that the State Troopers contributed in any way to the significant state interest of maintaining custody of the defendants. Indeed, the First Circuit seems to have overlooked the obligation of the committing squad to maintain custody of all defendants. With regard to the jury voir dire, the First Circuit rejected Justice Giannini's conclusion that the troopers had no influence. Justice Giannini clearly offered to exclude for cause any jurors who exhibited concern over the presence of troopers. The First Circuit, on the other hand, rejected the notion that a jury voir dire on this issue could serve any useful purpose. 749 F.2d at 965; *cf. Patton v. Yount,* 104 S. Ct. 2885, 2892 (1984) (jury voir dire effective means of testing for bias); *Sheppard v. Maxwell,* 284 U.S. 333, 358 (1966) (criticizing trial judge for failure to question jurors on possible effects of pretrial publicity). Indeed, as noted *supra,* the First Circuit seems to have imposed an irrebutable presumption that jurors were lying when they testified that the troopers would not effect their judgment:

> "Even if all jurors had indicated an unreserved opinion that the troopers' presence would not affect them, such expression, on a case as extreme as this, where there was no need to rely on it, is totally unacceptable." 749 F.2d at 965.

Equally inappropriate was the First Circuit's criticism of Justice Giannini for declining to consider other alternatives to the security measures employed. This patently *post hoc* analysis is contrary to this Court's suggestion in several recent cases. *See United States v. Sharpe,* 105 S. Ct. 1568, 1576 (1985); *United States v. Montoya de Hernandez,* 105 S. Ct. 3304, 3311 (1985). Justice Giannini had a real life trial unfolding before him. The state authorities charged with maintaining court security advised him that the only method of maintaining minimal standards was the use of state troopers. On such a record the First Circuit's criticism of Justice Giannini is especially improper.

C. Examination of the Totality of the Circumstances of the Trial reveals that Flynn Received a Fair Trial.

This case involves the defendant's right to a fair trial. As has been demonstrated elsewhere in this brief, the proper inquiry in such a case is whether, in the totality of the circumstances, the trial or its result were unfair to the defendant. *Kentucky v. Whorton, supra.* The Petitioners submit that, had the First Circuit applied the proper "totality of the circumstances" approach, the result of this case would have been different. First, and most significant, the court would have been compelled to

consider Justice Giannini's factual conclusion that the troopers were necessary to maintain ordinary security standards in the courtroom. In addition, the court must look to the fact that the jurors who were seated in this case clearly were unaffected by the presence of the troopers. This is evident not only from their statements during voir dire, but also from the fact that three of the defendants on trial were found not guilty. *See* notes 1, 4 *supra*. It strains credulity to suggest that this jury could have, on the one hand, been impermissibly influenced by the troopers, and yet, on the other hand, returned not guilty verdicts as to half of the defendants on trial. This, however, is the apparent basis of the First Circuit's refusal to recognize the acquittal as having any bearing upon the jury's demeanor. 749 F.2d at 966. The Petitioners submit, moreover, that the First Circuit's suggestion to the contrary notwithstanding, the evidence against defendant Flynn was overwhelming. Two of his accomplices clearly and unmistakenly identified him as one of the robbers. A third impartial witness was able to identify him as having been present during the robbery. This was no circumstantial case, based upon inferences or suspicions. With all due respect to the First Circuit, this was a direct case with overwhelming evidence. The crime was a major robbery that was carefully orchestrated and carried out by a large group of hardened criminals. There was a great deal of evidence of culpability—especially on the part of defendant Flynn. The First Circuit concluded, moreover, that the trial was otherwise free of prejudicial error. 749 F.2d at 963.

On the totality of these circumstances, the Petitioners submit that defendant Flynn was not deprived of a fair

trial by the presence of these officers in the courtroom. The First Circuit's failure to apply the "totality of the circumstances" analysis was erroneous and must be reversed.

CONCLUSION

The Petitioners respectfully submit that the First Circuit erred in ordering issuance of the writ of habeas corpus in this case. In the Petitioner's view, Justice Giannini acted properly in permitting officers of the State Police to remain in the courtroom during the trial of this case. Accordingly, Petitioners respectfully request this Honorable Court to enter judgment reversing the judgment of the First Circuit and remanding with direction that the judgment of the District Court denying the writ be affirmed. Alternatively, Petitioners suggest that in light of the failure of the First Circuit to accord appropriate deference to the state courts' factual findings, this Court may wish to remand the case for further proceedings. In the event that the Court chooses this course, Petitioners ask that the Court make clear that it is Flynn, as habeas petitioner, who bears the burden of demonstrating his right to relief.

For the foregoing reasons, and for such other reasons as may appear on oral argument, the Petitioners herein

demand judgment reversing the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 84-1606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRANCE HOLBROOK and JOHN MORAN,
Petitioners,

v.

CHARLES FLYNN,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Can extraordinary courtroom security, in the form of an in-court "show of force" surrounding the defendant, be imposed in a criminal trial over a timely defense objection without a showing that it is necessary to serve compelling governmental interests and that less prejudicial alternatives cannot accomplish the same state goals?

2. Can pretrial *voir dire* either excuse or correct for the unjustified imposition in a criminal trial of an extraordinary and presumptively prejudicial courtroom "show of force" surrounding the defendant?

3. Did respondent receive a fair trial under the totality of the circumstances where the evidence of guilt was not overwhelming and inherently prejudicial courtroom security techniques were unjustifiably imposed, over defense objection, in a "notorious" and highly publicized case?

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STATEMENT

This *habeas corpus* petition challenges the conviction of Charles Flynn in connection with one of the "most highly publicized" cases in the history of Rhode Island.[1] Although the petition concerned the overall "armed camp" atmosphere prevailing at the trial, both lower federal courts have treated it as though it dealt only with the fact that, in addition to the regular courtroom security personnel, four armed and uniformed Rhode Island State Troopers remained in the front row of the spectator section of the courtroom, directly behind the accused, on each day of the trial. Pet. at 4-6.[2]

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[1] Petition for Certiorari (hereinafter "Pet.") at 3. The "highly publicized" nature of this ten-year-old trial sets the context for all else that transpired. For months, the Bonded Vault case was front-page news, as well as a lead item on television and radio. The prosecutor "welcome[d] publicity," (T. 64) although he also admitted that there was a "great amount of notoriety" attached to this episode and, hence, a "greater danger that a jury could be influenced than in the usual case." (T. 53).

The Governor (and, as such, commander of the State Police), in the midst of a campaign for the U.S. Senate, received front-page coverage for a mid-trial press conference publicly justifying the courthouse security with a variety of sensational, unsubstantiated charges, including, in complete contradiction to what the record shows, that "you have dangerous people misbehaving and acting up in that courtroom." *See* "Noel upholds guards at Bonded Vault trial," *Providence Evening Bulletin*, June 24, 1976 at p. B.1. Press accounts of the trial described the defendants as "very orderly," "attentive," and "well groomed." *See* "Tedium of Bonded Vault trial detail is relieved by lawyers' bickering," *Providence Journal*, July 14, 1976, at p. B.1.

[2] Press reports of the trial state that, in addition to the four armed and uniformed troopers whose presence is developed in the record, there were also "a scanner sensitive to eyeglasses and buckles" in the hallway, and SWAT teams comprised of "black-uniformed state troopers . . . outside the courthouse with shotguns and rifles." "Vault principals wilt in a long hot hassle," *Providence Journal-Bulletin*, July 7, 1976, at p. 1.

I. Proceedings At The Trial Stage

A. Initial Trial Court Proceedings

Counsel raised the issue of jury prejudice by reason of the armed and uniformed troopers before jury selection began, noting that this "unusual procedure" would tend to cause the jury to see the defendants "looking like bad men, bad characters." He suggested that the courtroom be secured instead by plain clothes officers, including some from the Providence Police department, who were already there and not drawing "unusual attention" to themselves."[3] The prosecutor did not argue that the presence of the armed and uniformed troopers was necessary, and left the matter to the administrative discretion of the court.[4] The court disclaimed any responsibility for

[3] Petitioners' attempt to imply that the defendants conceded the legitimacy of having armed committing squad officers conspicuously sitting behind them, Br. Pet. at 23-24, is without foundation. Defendants consistently focused on the need to put any necessary security force into "plain clothes." (T. 48) The question of using committing squad officers instead of troopers entered this case as part of the state's explanation of how the troopers came to be present, not through any concession by defendants. The very real distinction between the committing squad and state trooper uniforms was, however, noted twice (once explicitly and once implicitly) by the state Supreme Court during the course of this trial. Compare *State* v. *Byrnes*, 355 A.2d 911 (R.I. 1976), with *State* v. *Pugliese*, 362 A.2d 124 (R.I. 1976). *See also State* v. *Patriarca*, 308 A.2d 300, 323 (R.I. 1973) (commending trial judge for having marshals who guarded witness remove their guns in front of jury) (general in-court security at this trial was provided by plainclothes officers, *see infra* at pp. 8-9.)

[4] Immediately thereafter discussing his request for jury sequestration, the prosecutor referred extensively to the "greater danger that a jury could be influenced in many ways" because of the "great amount of notoriety" that was attached to this case, a risk made even worse by "the smallness of the State." (T. 53) He specifically noted that *voir dire* examination may not be adequate to protect a jury in such a case: events unforeseeable at the time of *voir dire*, he said, can always intervene. (T. 53).

the officers, stating that "the Court has not requested" their presence, (T. 47-49), and indicated, before *voir dire* had even begun (T. 50), that it did not believe the troopers' presence created any special risk of prejudicing the jury. (T. 49).

The trial judge issued his first decision concerning the troopers' presence shortly afterward, stating that he had "received a report" to the effect that "so far as the Court can determine," state troopers would be present throughout the trial, "because of lack of manpower in the Department of Corrections committing squad." The court said it had been informed that it would not be "practical, from both an organizational point of view and also from a contractual point of view with the union representing the state troopers" to have the troopers in civilian clothes. The court therefore "fe[lt] impelled to permit the members of the department to be present in the course of the trial while in uniform," repeating its "already expressed view" that "This in no way prejudices any of the defendants." (T. 71-72).

In response,[5] one co-defendant immediately requested bail and pledged that he and the other defendants "are not going to cause any scene. We have the utmost respect for this courtroom." (T. 77-78). Counsel for respondent protested that such an unusual practice "must be based on an underlying factual situation" and that a state police union contract "is not a sufficient factual basis to allow this type of procedure."[6] Arguing

[5] "The jury would not take this superficially if they see the armed uniformed state policemen sitting right in the back of us . . . this is not a normal courtroom procedure for uniformed state troopers to be in here." (T. 76).

[6] The specific fear voiced was that an "inference" might arise that the defendant is "a person to be feared, as to violence" due to

> the fact that sitting behind the defendants, taking the first row, vacating the first row where the spectators sit, are four uniformed state police guards, armed, obviously sitting in a strategic location behind the defendants. What's the purpose? What is a layman going to say? Oh, they must be bad guys. Look what they've got. They got six members of the committing squad, two deputy sheriffs, four armed state policemen. That's twelve, plus Providence Police Department detectives and state police in plain clothes. (T. 80).

that no "exigency" required this change from normal procedure, he noted, without dispute, that "not one of these defendants has in the past, to my knowledge, ever acted in any way inconsistent with their responsibilities as a defendant during this trial."[7] (T. 79-82).

The trial judge then made his second ruling on the trooper issue.[8] He stated that

[7] Counsel noted that he had previously represented Mr. Flynn in a 30-35 day trial "and at no time was he ever disorderly, disrespectful." (T. 82).

[8] Before reaching the issue of the troopers' presence, the court first made another important ruling, holding with regard to the co-defendant's request for bail that, since the defendants had previously been denied bail by a coordinate judge, he lacked the power now to grant it.

This interpretation of Rhode Island bail law was manifestly erroneous. A trial court in Rhode Island possesses full authority to reconsider bail determinations notwithstanding any contrary prior ruling over courts may have made. *Tagliametti* v. *Fontaine*, 253 A.2d 609 (R.I. 1969) (case remanded for trial justice's bail redetermination despite earlier contrary ruling by a different judge). In Rhode Island bail is mandatory in less-than-capital offenses, and even those charged with such capital offenses may only be denied bail upon an exceptional state showing. R.I. Const. Art. 1, § 9. And even in capital cases where the state has carried its evidentiary burden, the court still has discretion to release the accused. *See State* v. *Abbott*, 322 A.2d 33, 35 (R.I. 1974) (rape suspects released on both post- and pre-trial bail). Denial of bail is never mandatory. Although it is *now* true, as petitioners claim, that a "defendant may be held without bail *only* upon finding that it is required to assure his attendence at trial," Br. Pet. at 10, n.3, this did not become the law until four months after this trial was over. *Fontaine* v. *Mullen*, 366 A.2d 1139 (R.I. 1976); *DiMasi* v. *Mullen*, 366 A.2d 1149 (R.I. 1976). At respondent's pre-trial bail hearing, no inquiry was made into his, or his co-defendant's, ties to the community, or the likelihood that they would flee. Bail Hearing Tr., Jan. 26-Feb. 2, 1976.

Following trial, three different judges released each of the three convicted defendants to bail pending their (four-year) state court appeal. *See* Indictment No. 76-53 (R.I. Super. Ct.), at Docket Sheet, p. 14 *et seq.*

> the presence of the troopers here, and the number of committing squad, is not by dictate of this Court. The security we have in this courtroom is . . . a direct result of those to whom that responsibility has been delegated by the Supreme Court Committee on security. (T. 83).

Conceding that "state troopers in this State are not unfamiliar to these jurors," and noting "the concern of the defendants in what these inferences may be," he nonetheless termed the defendants "overly sensitive from what jurors may derive or infer by the presence of state troopers." (T. 84).

He rejected defense requests for a more focused inquiry, declared that he would make "no determination . . . about the presence of the troopers," and refused to hold "a hearing on the proclivities of each of these defendants" as a way of determining whether security of this form was needed. Instead, he suggested that pre-trial *voir dire* of potential jurors would suffice to show if the threat of prejudice were real (T. 84-86). Counsel immediately objected that pre-trial *voir dire* would produce inherently unreliable results, regardless of what the prospective jurors might say. (T. 87). Thereafter, to prevent further prejudice during the course of jury selection, defendants absented themselves from the courtroom. (T. 90).[9] The troopers, however, remained.

B. State Court Interlocutory Appeal And Remand.

As jury selection proceeded, the defendants immediately appealed this ruling to the Rhode Island Supreme Court.[10]

[9] For the same reason, they also subsequently absented themselves from parts of the trial as well. (T. 339, 379).

[10] Defendants scught interlocutory review at once, but the state Supreme Court at first declined to exercise its discretionary jurisdiction to hear the case. A week later, when a transcript of the Judge's remarks (including his remarks concerning *voir dire*) was made available, the Supreme Court reversed itself and accepted the case. Among its factual findings, were that "four uniformed and armed State Troopers . . . [as] *part* of the courtroom security force are seated in the rear of defendants in a front row of seats usually occupied by spectators." *Byrnes I*, at 348-9 (emphasis added).

Noting that the petitioners "are being held without bail," *State* v. *Byrnes*, 357 A.2d 448 (R.I. 1976) (hereinafter "*Byrnes I*"), that court held that

> the presence of armed, uniformed police officers acting as a security force in criminal courtrooms in this jurisdiction is a departure from the practice usually found in the trial courts of this state . . . the presence of numerous uniformed armed law enforcement officers might be considered a form of restraint, and a showing of need of their presence should be required in such circumstances. 357 A.2d at 448-449.

Referring the trial judge to the relevant American Bar Association Criminal Justice Standard,[11] the court disapproved the trial judge's attempt to pass responsibility for security determinations to "the so-called security committee or its advisers," and held that "the presence of the State Police is a decision that must be resolved *solely* by the trial judge after consideration of all relevant factors." *Id.* at 349. (emphasis added). In remanding the case for a hearing and findings, the court nowhere suggested that the effects of the troopers' presence could be

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[11] That Standard, American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, (App. Draft 1968) Standard § 4.1(c) (hereinafter "ABA Standard"), provides:

> (c) Defendants and witnesses should not be subjected to physical restraint while in court unless the trial judge has found such restraint *reasonably necessary to maintain order.* If the trial judge orders such restraint, he should enter into the record of the case the reasons therefor. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge should instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt. (emphasis added).

The official Commentary to that Standard (hereinafter "ABA Commentary") provides that the need for special measures requires proof of "exceptional circumstances." *See infra* at pp. 34-35. The Standard and Commentary were renumbered in 1980. *See* Vol. III., ABA Standards for Criminal Justice, Standard 15-3.1(c) (2d.Ed. 1980).

eliminated through pre-trial *voir dire*, which it was aware was already in progress. *Id.* at 348.

The trial court thereafter held the mandated hearing. It heard only two witnesses, neither of whom added any new factors to those the court had previously considered or testified to any unusual security needs or dangers presented by these defendants.

1. Captain Robert Melucci

The first witness, Captain Robert Melucci, the principal officer of the committing squad (a unit of the Rhode Island Correctional Department), testified that he supervised the twelve-person unit regularly assigned to Providence County Superior Court to provide security during proceedings involving incarcerated defendants. He said he also had thirteen additional officers assigned to other, never specified duties. (T. 114-115). Due to various duty assignments, he was usually left with six officers to cover four courtrooms (T. 116). Although he "normally" would "try to use a ratio of 2 to 1," of officers in relationship to defendants (T. 117),[12] his staff had been inadequate to provide this level of security in the courthouse on the previous day, *despite* the presence of the troopers, and this over-extension of his staff "has been normal for the last couple . . . three years." (T. 117). The maximum number of officers Captain Melucci had ever had available for defendants' trial was

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[12] By his own testimony, Captain Melucci therefore could at best only put three officers in any one courtroom at any one time, a number insufficient to provide two-to-one coverage in even a two-defendant case. As further evidence that what Capt. Melucci described as "normal" was actually "optimal," he also specifically mentioned that, on the previous day, in courtrooms other than defendants', the ratio had been 5:3 in one and 3:2 in the other. In defendants' courtroom, removal of the uniformed troopers would apparently have left the ratio no lower than 4:3, *leaving aside* the numerous other law enforcement officers who were also in attendance. (T. 47-9, T.80).

six (T. 118). He believed a security risk was created "when you start getting a ratio of one to one . . . we like to use a ratio of two to one." (T. 120).

Captain Melucci also said that he had not personally requested armed and uniformed state troopers to substitute for his staff, but had merely referred the general question of courthouse security to the calendar session judge. (T. 122-123). The calendar session judge had then called "the Major" of the state police and requested state police assistance. (T. 124).[13] He said that (other than the fact that the troopers "didn't know the routine") "there is no reason why" the four officers of his command who were working in the non-jury calendar part could not be replaced by the uniformed troopers scheduled to attend defendants' jury trial. (T. 126). He said that the decision on where to send the troopers was within his discretion. He noted that the members of his squad ordinarily do not bring weapons into the courtroom, but that the state troopers had refused his request to appear without weapons. In a discussion between himself and the state police captain, "it was decided that this [trial courtroom] would probably be the best place" for the troopers. The *court* observed, at this point, that having armed guards in the courtroom was not usual procedure. (T. 129-131).

Captain Melucci also testified he could remember one other trial, "maybe a year-and-a-half ago,"[14] when he thought the state police had been present. The court "accepted," however, that even at that trial the in-court security was provided by

[13] Defense counsel was not permitted to inquire, for purposes of determining overall courthouse security needs, whether any other courtroom also had a metal detector outside and uniformed state police doing pre-entry screening, and whether the use of such equipment outside the courtroom might reduce the need for in-court security personnel. (T. 124-125).

[14] Subsequently corrected: the trial in question was in fact six years earlier, and involved considerably more serious charges. (T. 133-4). *See State* v. *Patriarca*, *supra*.

plainclothes, not uniformed, state policemen. Captain Melucci confirmed that he could not recall a single previous occasion on which uniformed troopers had appeared at a criminal trial: "If I'm not mistaken," even in that one prior case where state police assistance had been used, "they were plainclothes detectives," not troopers in full uniform. (T. 134-5).

2. Major Lionel Benjamin

Lionel Benjamin, Major and Executive Officer of the Rhode Island State Police, testified that he had two units within his command, uniformed and non-uniformed (T. 138). He stated that, "in case of security, such as we have here . . . *we deem it necessary* that uniformed men be employed for that," because, in addition to providing security during the trial, the troopers also escorted the six defendants "from the ACI [Adult Correctional Institution] along the highway, *into this courtroom* and continue right on until the adjournment of the trial." (T. 139-140) (emphasis added). He testified he had 30 plain clothes investigative detectives, 150 uniformed troopers, and an unspecified number of nonuniformed detectives working as experts in state police laboratories. (T. 140-141). Following the calendar judge's request, the Major had instructed the state police captain in charge of the detail not to "physically handle the inmates"[15] and to serve "strictly as backups" for the committing squad members. (T. 141). Without citing any authority, he claimed it to be policy that "Trooper never takes his weapon off, anywhere."[16] (T. 142). Asserting that "we don't have suffi-

[15] This procedure, however, was later clearly not observed. Indeed, the only even mildly contentious moment in this trial concerned interactions between two co-defendants (but not respondent) and the state police, who had allegedly made threats against those defendants and handcuffed them in an excessively forceful manner. (T. 1847-1856)

[16] The Rhode Island State Trooper Uniform, which is at the center of the controversy in this case, is, and is intended to be, intimidatingly impressive. The demeanor and bearing of the troopers are well-known to the people of the state, and their uniforms and public

cient detectives to deploy to this courtroom," he said that if the court requested that the uniformed troopers appear instead in plain clothes, "that's something that I'd have to discuss with my superintendent," because "we deemed that" it was "a uniform detail." (T. 143-144).

He stated that he had already discussed whether the troopers should be in uniform with the Superintendent and that the Superintendent's "feelings was the uniform men should stay here for security." The choice of uniformed troopers reflected "our own feeling as to who should be in here as far as security is concerned." (T. 145). He refused to answer whether he *could* order troopers to appear in plainclothes by asserting "I don't see any reason for it." (T. 148). He also expressly conceded that the troopers' union contract did *not* "specify the duties of a uniformed state trooper and then specify the duties of a plainclothes state trooper." (T. 151). Those were, rather, "a determination made by us." (T. 151).[17]

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demeanor are the subjects of extensive regulations. *See* Appendices A, B, C, and D *infra*. The committing squad uniforms, in contrast, appeared to the witnesses as simple "blue shirts." (T.1028). A witness who knew a state trooper when she saw one (T. 994) was not even sure if the committing squad officers were police. (T. 1028). Despite petitioners' present arguments, Br. Pet. at 23-24, it is petitioner's position, not respondent's, that the committing squad officers could have been substituted for state troopers without the special findings and procedures respondent contends are constitutionally required. The defendants had consistently requested officers in plain clothes. (T. 47).

[17] Earlier, when asked, "By contract, you can only supply uniformed police officers for security detail?" He had responded, "No, not necessarily." (T. 139). He conceded that no grievance had ever been filed for asking a trooper to perform his duties in plain clothes and that in an emergency he would ask troopers to do so. (T. 147). Earlier he had stated that, due to a union contractual agreement which "I can't explain" (T. 144), there are "many factors that enter into the picture," including "paid differential" between "the uniformed and plainclothes troopers." (T. 144). Therefore, he asserted, he "could not afford" to use plain clothes officers. (T. 146).

Pressed, Major Benjamin further conceded that the union contract previously referred to by the court was at best only "one of the reasons" uniformed troopers had been assigned to the courtroom. (T. 153). In addition, he said,

A. I think it serves a very good purpose. (T. 153).

Q. What's that?

A. Clearly identifiable.

Q. Clearly identifiable? Uniformed police with guns clearly identifiable by the jury, isn't that correct?

A. I didn't hear any juror have any opposition to it during the time I was in the courtroom.

Q. I'm sure you didn't, but I'm asking you clearly identifiable by the jury, as uniformed state armed police officers, is that correct?

A. It's a good deterrent *as well*.

Q. And that's the reason you want them in the uniforms, not because of any contractual obligation which you have the power to vary, because you *want* them in uniforms.

THE COURT: It is a good argument.

(T. 154) (emphasis added).

Major Benjamin also testified concerning the pay implications of using plain clothes detectives, as opposed to uniformed troopers. As the first of their many efforts to find less restrictive alternatives consistent with the state's asserted interests, the defendants thereupon offered to pay any extra costs involved in having non-uniformed guards. (T. 156).

At the end of his testimony, Major Benjamin paused and, contradicting what he had said a few moments earlier (T. 143-4), said that he would definitely "have to withdraw" the troopers if the judge requested that they appear in civilian clothes. (T. 161).

C. The Trial Court's Post-Hearing Ruling

1. The Need For Security

The court thereafter delivered the ruling directly at issue here.[18] Despite the State Supreme Court's order that he disregard decisions made by any "so-called security committee or its advisors," and that he consider whether "exceptional circumstances" required this unusual courtroom restraint in order "to maintain order," ABA Standard §4.1(c) and Commentary, he nonetheless expressly redefined the purpose of his inquiry in his own, already rejected terms:

> The Court considers that the questions to be resolved here, *in spite of what the Supreme Court* had to say about the analogy of physical restraint, is whether or not the kind of security, *not courtroom security* but security . . . that is the responsibility of a warden in the first instance . . . is *reasonable*,"

noting simultaneously that the existence of this "physical restraint" in the courtroom was "*evident* by the presence of the committing squad officers and the state police." (T. 224-225) (emphasis added).

He said that Captain Melucci "attempts to use a ratio of two officers for every defendant," that the state police had come to be present by virtue of the Captain's conversation with the calendar judge, and that the committing squad had no authority to order the state police to be in plain clothes. (T. 225-227).

The court summarized Major Benjamin's testimony as follows:

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[18] Although the third sentence of the Supreme Court's order stated that "the defendants are being held without bail," *Byrnes I*, *supra* at 448, the trial judge nonetheless began his ruling by stating his

> . . . conviction, that the Supreme Court has not been informed that the defendants on trial are being held without bail . . . I think it is clear to everyone that were the defendants free on bail, if they were not under physical restraint . . . there would not be any policemen in this courtroom, uniformed or plainclothes. (T. 224).

> It was his testimony that uniformed men are deemed necessary for courtroom security *because that's the way the contractual agreement was set up.* And he referred there to the collective bargaining agreement between the department and the bargaining agent for the state police. This, he said, is a security detail, and *uniforms are required.* (emphasis added)

The court noted that "when [Major Benjamin] was asked with regard to the necessity of having troopers, armed in the courtroom, his response was 'Trooper never takes his weapon off anywhere,'" and that the Major had said he would withdraw the troopers altogether if the court requested that they appear without their guns or in plain clothes. He also noted Major Benjamin's statement that apart from any contractual matter, "the superintendant of the state police feels they should be here in uniform." (T. 227-228).

The court concluded that the committing squad needed "to rely on auxiliary services" (T. 220) to make sure the defendants were safely transported to and from court, and "are kept in the courtroom in the course of the trial." (T. 228). He also

> stresse[d] that if these defendants were admitted to bail, there would be no state policemen and there would be no committing squad officers in this courtroom . . . [the defendants] ought to recognize that the presence of the state police is necessary because of the insufficiency in the ranks of the committing squad itself,

noting that the troopers were present as "delegates of the warden of the Adult Correctional Institution." (T. 229).[19]

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[19] Although petitioners now suggest that various other factors besides respondent's bail status went into the judge's ruling, Br. Pet. at 27, none of those factors was ever relied on by the court, which of course had never requested this heightened security in the first place. Indeed, after the ruling at issue here was made, the court explicitly denied that it had relied on any *de hors* record factors in reaching its decision concerning in-court security (T. 2328). There is thus no basis for remanding this matter for a further statement of reasons by the trial judge pursuant to 28 U.S.C. § 2243, as petitioners have suggested. Br. Pet. at 23.

2. The Potential For Prejudice

In assessing the prejudicial impact of the troopers' presence, the court relied entirely on the *voir dire* testimony of potential jurors. According to the trial court, fifty-one of the fifty-four potential jurors who were questioned concerning the troopers testified that no inference of guilt was created by the presence of the armed, uniformed state troopers. One of those tentatively selected, however, "did not tell us whether or not the presence of uniformed state troopers would create any inference of guilt, but went on directly to say the trooper's uniform made her nervous." Another said "that somebody caught these men and that the troopers are here to see that everything functions without interference." A third testified, "the troopers make me very nervous. Guns make me very nervous. I am nervous about the state police being here. . . . I don't know whether they are here to protect me or what. I don't know what they are here for." (T. 231).

In response "to the question which was put to them seeking to elicit from them what reason they may have had in their mind for the presence of the troopers," the court continued, thirteen of the fifty-four prospective jurors who were asked answered that "they didn't know why the troopers were here," and ten of them responded "security." (T. 231). As further support for his conclusion that there was no prejudice, the court then listed a "sample" of the answers received from the remaining thirty-one prospective jurors.[20] Among the answers "sampled" (T. 231-233) were:

> "They are here because of the incident [unrelated to this trial][21] that occurred."

[20] Except as noted here, the judge did not state, and the record does not reflect, which of the "sampled" statements came from which prospective juror and whether any particular individual making any particular comment did or did not serve on the actual jury. The complete *voir dire* has never been transcribed or reviewed by any court.

[21] Apparently, on some earlier occasion, a prisoner in another matter had tried to assault a correctional officer.

> "Because of the kind of case this is following the prior incidents."
>
> "They are here because the defendants are here."
>
> "Because the judge asked them to be here, I assume, I don't know why."
>
> "They must have investigated the crime."
>
> "I don't know if this is the common thing, I don't know why."

By Juror Number 14, "I believe they are here because this is a courtroom, but there are two of them on the outside of the courtroom and I don't know why they are here."

> "The defendants are locked up and therefore it must be security."

Juror Number 4 "told us that he hadn't thought about it, but that some panelists thought it was strange that they were here."

> "They are here because the court ordered them here; I think people would demand it to protect the public."
>
> "They are prisoners and are being held and the police are their escorts."

Others said "they escorted the defendants here and they escorted them back."

> "Another guessed that they were present because they are authority and for protection." [When asked "whose protection?"] "For mine and the people who are here."
>
> "It may be the way all criminal cases are taken care of. I see no other reason because the defendants are not here"[22]
>
> "Because the defendants have been accused of a crime."

[22] At least one of the jurors, however, having previously served on a jury, was in a position to inform this juror that the exact opposite was true. This juror's prior experience was referred to by the judge as an asset that he hoped would be shared with the other jurors. (T. 104-5).

On the basis of this *voir dire* testimony, which it only "sampled," the court stated that, as of the time of their answers,

> *none* of the persons who were examined created *any* inference of guilt in their mind with respect to these defendants. (T. 233) (emphasis added).[23]

In denying defendants' motion to exclude the troopers, or to have them appear unarmed in civilian clothes, the court concluded,

> I am firmly convinced, and I find on this testimony of the jurors . . . that armed state troopers in uniform, in this courtroom, has no affect (sic) whatsoever upon the constitutional rights of these defendants. (T. 233-234).

3. Defendants' Suggested Alternatives And Post-Ruling Events

The defendants immediately protested, (T. 234), suggesting a number of other means of resolving the controversy. Counsel for one co-defendant moved to sever his client's trial, stating that his client was not a security risk and should not be subjected to trial in the atmosphere of an "armed camp" merely because of "the convenience of the police," and without considering other staffing patterns that would have replaced the uniformed troopers with plain clothes personnel. (T. 234).

Respondent and two additional co-defendants also immediately moved to be released on bail, because the lack of bail—denied by a different judge without knowledge of that denial's

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[23] Despite the judge's subsequent acknowledgment that corrective instructions can be essential to a fair trial, (T. 2651, 4047), the record reflects no contemporaneous or subsequent instruction from the judge to the jury explaining why the troopers were present, or correcting the misimpression shared by several jurors that the court had ordered the troopers to be present.

unprecedented impact—now appeared to have direct implications for their right to a fair trial.[24] (T. 236, 238).

Counsel contended that the *voir dire*—with the "jurors called one by one in almost empty courtrooms, with a certain number of state police sitting there and with the defendants sometimes here or sometimes absent" (T. 240)—could have but little bearing on the issue of an "armed camp during the course of trial." (T. 234, T. 240).

The court denied all of defendants' motions, because "in spite of what has been termed the trial atmosphere," he was

> persuaded beyond any doubt that the jurors who are sitting in judgment here are not in any way affected by the presence of uniformed state police officers. (T. 244).[25]

Finally, counsel suggested that the defendants would only attend the trial two at a time, so as to reduce the number of detainees to a level that could be handled, in accordance with

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[24] Referring to "that psychological inference that's drawn as to the uniformed state police with arms, with very impressive uniforms" (T. 240), counsel argued that "the obvious cure for any constitutional violation is to admit the defendants to bail." (T. 239). *See also "In The Service of the State,"* R.I. Bicentennial Foundation Report on R.I. State Police, *excerpted at* Appendix B. *infra*. Counsel also corrected the court's mistaken impression regarding the State Supreme Court's supposed lack of awareness of defendant's bail status at the time it ordered the trial court's just-concluded hearing. (T. 236) To this, the trial judge responded, "Well, then this Court does not understand the reason why the Supreme Court talks about courtroom security, because if the defendants were admitted to bail, there wouldn't be any courtroom security, as the Supreme Court characterizes it." (T. 237). The prosecutor waived argument on the bail issue. (T. 242).

[25] The court also rejected counsel's further alternative suggestion that the public be barred from the trial and that extra-strong security be posted outside, so that the courtroom could be a trooper-free security zone, secured from the outside with no troopers actually located within the jury's sight. (T. 245-246).

the committing squad's own theory, by the available committing squad staff alone. (T. 249). The court, however, would not commit itself to this solution: "If the defendants wish to absent themselves, except for two of them at any particular day, I will have to wait and see what the committing squad does with regard to security."[26] (T. 250-251).

* * * * *

As the session drew toward a close, defense counsel noted that "there are now standing in this courtroom three armed uniformed state policemen, standing up, while this court is still in session. May I inquire, is that going to be a regular procedure?"

The court responded: "I don't know. I don't know why they are standing, but may be they have their orders." (T. 253).

D. Evidence On The Merits

Only three witnesses testified against respondent at trial.[27] The jury substantially disbelieved two out of the three, and

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[26] Although the defendants did absent themselves from significant parts of the trial in an effort to reduce the prejudicial impact of the troopers, (T. 339, 379) the prosecutor nonetheless asked for "four state troopers to be here continuously, regardless of what the circumstances may be." If the defendants came in (for identification by prosecution witnesses, for example), and the troopers *only* came at such times, seeing the troopers and the defendants together might, he believed, "alarm a jury." (T. 251). The court itself subsequently emphasized the troopers' crucial placement near the defendants in the courtroom. When a witness was standing up to make an identification, the judge suggested that the way to do so was "from the uniform, count over to your left, tell me what person he is." (T. 951).

[27] The trial judge refused to allow respondent to testify on his own behalf, holding that his counsel's waiver of cross-examination when he answered two questions during the presentation of a co-defendant's case precluded his re-assuming the stand when it was time to present his own.

acquitted three of the six defendants whose guilt or innocence depended strictly on the credibility of those two witnesses. The state's main witness, alleged co-conspirator Robert Dussault, said that he had decided to cooperate with the state only after being told by the State and Providence police, first, that respondent Flynn had been killed, and, second, that "the vault company" (*i.e.*, the *victims* of the crime, "*not* these gentlemen here") had secured "a contract to kill me." (T. 2839). In an effort to secure entry into the federal Witness Protection Program, and to avoid prosecution on this and other escape and robbery charges, the witness implicated Flynn after the police had told him Flynn was dead. By the time he realized that Flynn was alive, the witness had already given the police a video-recorded statement implicating him. At trial, he testified consistently with that statement, as he needed to do in order to avoid prosecution for perjury, in addition to his other crimes.

The only other evidence against respondent consisted of eyewitness testimony of questionable worth. That witness had failed to report seeing the face of the suspect she later identified as Flynn during early interviews with police (even though she did immediately identify another) (T. 1208), participated in an unconstitutional "show-up,"[28] and testified in such excessive detail that the trial judge expressed strong doubts regarding the credibility of several parts of her testimony.[29]

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[28] It is not a matter of dispute that the show-up was unconstitutional. (T. 1194) The several reviewing courts, however, while finding the show-up illegal, also have found that it did not leave an unconstitutional "taint."

[29] The judge felt "it takes a great deal of effrontery . . . to tell us that she is able to see the color of somebody's eyes through a pillowcase. . . ." (T. 1209) In addition, "her inconsistency when she testified that she gave a meager description of Mr. Flynn on August 20 and a fuller description on August 26," gave the Court pause because "it didn't seem to the court that that explanation [that 'she was scared'] held any water at all because she described Mr. Dussault completely right down to a ring that he was wearing" from the very beginning. "It doesn't make sense," he said. (T. 2-1548-9).

The trial judge's charge included no instruction to disregard the extraordinary courtroom security. His only reference to the police came in a "boilerplate" warning not to let personal feelings about anyone—"defendants, attorneys, [or] about state police or police *investigations* (emphasis added)[30]—interfere with consideration of the evidence. (T. 2-1510).

Following sentencing, the trial judge recused himself. Three different judges heard each of the three different defendants' motions for bail pending appeal. All three were granted post-conviction bail for the four-year period during which their state appeal was pending. Indictment No. 76-53 (R.I. Super. Ct.) at Docket Sheet, p. 14 *et. seq.*

II. Subsequent Proceedings

A. State Supreme Court

On direct appeal, the Rhode Island Supreme Court gave relatively little attention to the troopers' presence. The court inaccurately summarized the testimony of Captain Melucci to the effect that his eleven committing squad members could not

[30] This mention of "investigations" in the charge was most likely a reference either to a mid-trial hotel burglary against the sequestered jurors, or to various incidents of alleged state police harassment of defense witnesses, which "upset" at least one juror, who believed that one of the defense witnesses had been arrested after testifying. (T. 2-656). With respect to the burglary, it is significant to note that a Providence Police Department detective who had been a prosecution witness (T. 3691) and daily assisted the prosecutor at trial (T. 2-1108), happened also to be the officer who was immediately sent to the scene to supervise the investigation of the crime. (T. 3573-5, 3688-9). Following this, the defendants made a motion for a mistrial, which Flynn joined. (T. 3537, 3687). Seemingly unaware of this court's ruling in *Turner* v. *Louisiana*, 379 U.S. 466 (1965), the court denied the motion following an *in camera voir dire*, while at the same time expressing doubts concerning the worth of *voir dire* in such circumstances and the desirability of having "wiser and more numerous minds" make a *per se* rule to make such occurrences automatic grounds for declaring a mistrial. (T. 3690-1).

service five different courtrooms. Despite Captain Melucci's statement that he had not for some two or three years had the staffing resources he considered "normal," the court asserted that "The Squad's *standard operating procedure* called for two squad members for each prisoner being escorted into a courtroom." *State* v. *Byrnes*, 433 A.2d 658, 662 (R.I. 1981) (hereinafter "*Byrnes II*"). It stated further that, of the supposedly available eleven committing squad officers, six

> *were slated for* duty in Judge Frances J. Fazzano's courtroom. Four others were needed in a courtroom in which Justice William M. Mackenzie was presiding. *Id.*[31] (emphasis added).

Next, ignoring Major Benjamin's testimony concerning the troopers' escort and trial security responsibilities, and without any basis in or citation to the record, the court stated that the state police

> detail's duty was to make sure that those people coming into the courtroom did not pose a threat to the judge, the attorneys or the defendants.[32] *Id.*

[31] It did not note, as Captain Melucci did (T. 116-117), that these assignments were in non-jury parts. Moreover, the state appellate court committed numerous other errors relating to the supposed assignments of the committing squad. For example, Captain Melucci had said that, because of other duty assignments, he actually only had six officers to cover the four trial courtrooms, not eleven. (T. 115-116). Another indication of inattention to the record concerns the court's description of this crime as a "$4 million" robbery, a fact that is strongly suggestive that the extensive publicity may have affected more than just the jury. Although the $4 million figure was much bandied about in the press, not one-fourth of that amount was ever supported by evidence adduced at trial. (T. 1649, 1670).

[32] The record of course is clear that the trial judge never heard evidence, or considered, or relied on a concern with any such "threats" as a reason for having the troopers present. His ruling was, emphatically, based only on the defendants' failure to be released on bail—"not courtroom security, but security that is the responsibility of the warden." (T. 225). This unsupported post-hoc focus on general "safety" was repeated, however, in the opinion of the first federal *habeas* court. See *infra* at pp. 23-4.

Similarly, and again directly contradicting the Major's testimony, the court said that "the State Police was unionized and that *its collective-bargaining agreement stipulated* that details such as the courtroom security were to be assigned to the uniformed rather than the detective division." *Id.* (emphasis added). The court also erroneously stated that Major Benjamin "testified that *departmental regulations require* that all uniformed troopers carry their weapons in their exposed holsters at all times." *Id.* (emphasis added).[33]

Making no reference to the fact that the absence of bail was the only reason stated for the elaborate security, the court briefly discussed the *voir dire*. It held that the trial judge had not abused his discretion regarding "the handling of an extraordinary event which may arise during a trial," holding that he had given

> a reasoned and careful consideration of the issues raised by the presence of the uniformed troopers and, after consideration of the issues raised by the presence of the uniformed troopers and, after consideration of all relevant factors, found that the presence of the troopers in no way prejudiced defendants. *Id.*

Although its discussion contained many errors regarding the testimony taken at the hearing (its conclusions, particularly the numerical ones, giving every indication of being merely extrapolations from statements contained in the trial judge's ruling, rather than the results of examining the evidence), and

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[33] Major Benjamin's testimony in fact makes no mention of any "departmental regulations," and no such regulations have ever been filed with the Rhode Island Secretary of State. *See* Rules and Regulations, R.I. State Police, certified copy on file with the Clerk of the Court. The court also seemed not to notice, *inter alia*, Captain Melucci's testimony that on the only previous occasion on which state police assistance for trial security had been requested, the in-court work had been done by plain clothes detectives, in spite of the supposed contract "stipulation" and "regulation" concerning trooper guns.

not one citation to the actual trial transcript, and even though the *voir dire* testimony upon which the determination of "no prejudice" was based had not been transcribed, the court nonetheless stated that

> we have reviewed the record, and we find no reason whatsoever to fault his conclusion. *Id.*

B. Federal Habeas Review

1. The district court denied respondent's petition for leave to proceed *in forma pauperis*, his right to be represented by counsel,[34] and held no hearing on the case.

Petitioner's claim concerning the "armed camp" issue was dealt with briefly. Without discussing any facts,[35] or making clear what factors it was considering, the court stated that "the circumstances of this trial were veritably, 'extraordinary.'" 581 F. Supp. 990, 997 (D. R.I. 1984).[36] The court reasoned that although

> security precautions may in some measure deprive a defendant of the physical indicia of innocence, they are not *per se* prohibited,

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[34] Leave for the appearance of his *pro bono* Massachusetts attorney *pro haec vice* was denied on the ground that a local rule prohibited the appearance of out-of-state attorneys in Rhode Island federal court in more than one case per year, thereby forcing respondent to proceed in the district court *pro se*.

[35] Despite the state appeals court's obvious failure to examine the underlying record, the district court stated that "the facts underlying [the trial-judge's] holding are adequately summarized by the appellate court," and his opinion indeed gives every appearance of being merely an extrapolation of the State Supreme Court's already-extrapolated views.

[36] The Rhode Island Court had in fact said no such thing. Its use of the word "extraordinary" was abstract and hypothetical, and not directed toward any *actual* event in this case. *Byrnes II* at 663.

and concluded that the trial judge had adequately balanced the presumption of innocence and the "safety" of everyone inside the courtroom. 581 F.Supp. at 998. Conceding that the security measures imposed were both "extreme" and "fairly debatable," the court asserted, without stating any reason or making any citation to the record, that "the necessity for heightened security for this trial was *manifest.*" *Id.* (emphasis added). With no further analysis, he concluded:

> Less totalitarian alternatives appear to have been explored and rejected on rational grounds. The security measures . . . did not, under the totality of the circumstances, deny due process or equal protection to the petitioner. *Id.*

The district court failed to note that the *only* basis for this "extreme" security relied upon by the trial court was that the defendants had not been released on bail.

2. The First Circuit reversed, relying on *Estelle* v. *Williams*, 425 U.S. 501 (1976), and holding that it was "constitutionally obligatory" that extraordinary displays of physical restraint of the accused before a criminal trial jury be justified by a demonstrated need to maintain order. 749 F.2d 961, 963 (1st Cir. 1984).

For the first time in any reviewing court, the First Circuit observed that only the fact that defendants had not been released on bail had ever been suggested as a reason for this unusual show of force, distinguished on that basis each of the cases cited by the district court, and held that the state had not shown anything approaching the requisite necessity. The Circuit questioned whether the nervous and equivocal answers elicited on *voir dire* sufficed to establish an absence of prejudice, but specifically did

> *not* rest our decision on such a factual issue. Even if all jurors had indicated that the troopers' presence would not affect them, such expression, on a case as extreme as this, *where there was no need to rely on it*, is totally unacceptable. *Id.* at 965 (emphasis added).

This was so, the court continued, because of the natural human tendency

> to believe that one is able to disregard "irrelevancies," and to be totally fair and impartial, or . . . to be unwilling to admit publically that one cannot. But even if one believed it fully at the time, insidiously this obliviousness can wear off. Observing, for over two months of trial, and constantly reminded, perhaps of the burden or of the expense, of keeping, not one, but four armed troopers daily in court sitting immediately behind the defendants, how could one help but think the state had cause to believe that there was a compelling necessity therefor. This was far more than a symbolic guard. Must not these, undoubtedly unarmed, defendants be very bad men, certainly not to be trusted? . . . It is beyond our imagination how this vivid, and constant, show of force could fail to detract from the presumption of innocence. . . . Once defendants are safely seated inside [a courtroom], a constant guardian of four armed officers speaks in superlatives, in terms of extraordinary apprehension, not routine caution. *Id.*

In view of the jury's apparent partial disbelief of the alleged co-conspirators, as evidenced by the three co-defendants' acquittal, and the evident vulnerability of the eyewitness identification which constituted the only other evidence against respondent, the court rejected the notion that this error could be harmless, and therefore granted the writ.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to a fair trial, including a fair jury trial in a criminal case, is a fundamental liberty secured by the Fourteenth Amendment. *Drope* v. *Missouri*, 420 U.S. 162 (1975); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). As the Court declared in another case involving "great excitement and indignation," this right applies with full force and power

> . . . regardless of the heinousness of the offense charged, the apparent guilt of the offender, or the station in life which he occupies.

Irwin v. *Dowd*, 366 U.S. 717, 719, 722 (1961).

Critical to this fundamental guarantee is protection of the trial process from contamination by irrelevant, prejudicial, outside-the-record factors. This Court has therefore repeatedly reversed criminal convictions where factors such as pretrial publicity, *Irwin* v. *Dowd*, *supra*; *Shepherd* v. *Maxwell*, 384 U.S. 333 (1966), unnecessary courtroom distractions, *Estes* v. *Texas*, 381 U.S. 532 (1965), and inappropriate contact between the jurors and law enforcement officials involved in presenting the prosecution's case, *Turner* v. *Louisiana*, *supra*, have interfered with the integrity of the trial process.[37]

This case concerns a defendant who, for no justifiable reason, was forced against his will to appear before the jury under inflamatory "security" conditions without precedent in the modern history of the state. This Court's unanimous ruling in *Estelle* v. *Williams*, 425 U.S. 501 (1976), that due process will

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[37] As the foregoing Statement makes clear, this case involves all three of these contaminating factors. In addition to the unjustified security measures directly at issue, petitioners themselves note that this was a case of "great notoriety in its locality"—one of the "most highly publicized" cases in the history of a state so small that ordinary remedies such as transfer of venue would be meaningless. Pet. at 3. It was also a case in which a police officer witness who did double-duty as the prosecutor's courtroom aide, daily visible to the jury as such at the prosecutor's elbow, personally—and visibly—injected himself into the investigation of a burglary that befell the sequestered jury in the middle of the trial. Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided that the asserted ground would not expand the relief which has been granted. *U.S.* v. *New York Telephone Co.*, 434 U.S. 159, 166, n.8 (1977); *Dandridge* v. *Williams*, 397 U.S. 471, 475, n.6 (1970). Consequently, respondent here expressly urges the Court to uphold the First Circuit's ruling on the basis of the infringement of his fair trial right due to these additional factors, as well as on grounds of equal protection and the other claims contained in the original *habeas* petition and/or referred to herein.

not permit an accused to stand trial in prison clothing over his objection, mandates reversal of this conviction. Every reviewing court has deemed the practices used here to have been presumptively prejudicial, and the trial court did not so much as mention a state policy of the requisite importance as a justification.

In such a situation, the right to a fair trial is not, and cannot be, preserved merely because the prospective jurors, on pretrial *voir dire*, may have declared that the inflamatory security measures would not affect their judgment. Here, as in *Estelle* (where pre-trial *voir dire* revealed the same juror declarations), the Constitution forbids the state from unjustifiably imposing presumptively prejudicial courtroom practices in a criminal trial, over an accused's objection, regardless of the existence of any (at best partially effective) "curative" devices. And even if *voir dire* were relevant, a review of this record demonstrates clearly that the trial judge's sanguine conclusion that these extraordinary measures had no prejudicial impact on the jurors is without "fair support."

Thus, under the totality of the circumstances, respondent's right to a fair trial was unjustifiably infringed.

ARGUMENT

I. The "Armed Camp" Atmosphere At Respondent's Trial Denied Him A Fair Trial.

A. An "Armed Camp" Atmosphere During The Jury Trial Of A Criminal Case Violates The Accused's Right To A Fair Trial.

This Court has consistently defended the integrity of the criminal trial process against both prejudice and disorder. *Sheppard* v. *Maxwell*, *supra*; *Illinois* v. *Allen*, 397 U.S. 337 (1970). In doing so, it has not merely been pursuing abstract theoretical concerns: as Justice Holmes pointed out more than seventy years ago, in a case which also involved an "armed camp" atmosphere inside and outside the trial courtroom,

guaranteeing the right to a fair jury trial "is not a matter for polite presumptions":

> . . . Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere.

Frank v. *Magnum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting).

The right to a fair trial of course includes as a "basic component," *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976), a presumption of innocence in favor of the accused, a principle that

> is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Coffin v. *United States*, 156 U.S. 432, 453 (1895). Because the presumption of innocence can be destroyed if the jury becomes aware that a defendant is in custody, *Bell* v. *Wolfish*, 441 U.S. 520, 553 (1979),[38] this Court has easily and unanimously concluded that the likelihood of prejudice arising from the accused's appearance at trial garbed in prison clothing is so great that it may not constitutionally be permitted over a defense objection. *Estelle* v. *Williams*, *supra*. The trial judge here, however, proceeded strictly upon his own pre-conceived conclusion, first articulated well before the *voir dire* he "relied on" was completed (T. 72), that the presence of conspicuously armed state troopers in highly "identifiable" military-style uni-

[38] This Court held in *Bell* v. *Wolfish*, *supra* that the presumption of innocence (there held inapplicable to the administration of pre-trial detention facilities) not only does apply in the courtroom, but that it is intended precisely to guarantee a verdict based solely on the evidence

> and not on the basis of suspicions that may arise from the fact of his arrest, indictment or *custody*, or from other matters not introduced as proof at trial.

Id. at 553 (emphasis added).

forms,[39] sitting in a row directly behind the defendants, in a courthouse with the general atmosphere of an "armed camp," was not even a "*possible* impairment" to the presumption of innocence. *Estelle* v. *Williams*, *supra* at 504 (emphasis added).[40] This remarkable premise cannot be squared with this Court's conclusion in the closely analogous circumstances presented in *Estelle*, or with the conclusions of the Rhode Island Supreme Court in its interlocutory order, or with the American Bar Association Criminal Justice Standard (developed following careful study of trial courts' actual practices) to which the trial judge had been specifically referred.[41] His premise was

[39] State police regulations make clear that members of the plainclothes force are not identifiable as such in the eyes of the general public. The uniformed force, in contrast, is subject to numerous regulations, not only regarding attire (the need always to wear the trooper hat, for example), but also regarding posture and the need to maintain an aloof personal demeanor while interacting with the public. *See* Appendix B, *infra*.

[40] Although the presumption of innocence is the primary interest impaired by such displays, the infringement of respondent's right to a fair trial caused by this "armed camp" atmosphere does not stop with the probability that the intimidating atmosphere would prejudice the jury. Here, the defendants were required by the unusual psychological pressure generated by the troopers to choose between their right to be present at trial and their right to have the presumption of innocence fairly applied. Rather than appear before the jury in the "armed camp" atmosphere created by the troopers, respondent was driven to absent himself from the entire jury selection process and part of the trial itself. The American Bar Association, together with numerous lower state and federal courts, has noted that the confusion and embarassment the psychological presence of excessive security measures can create, even in cases less extreme, can by itself amount to a denial of the right to a fair trial. *See* ABA Commentary at p. 92.

[41] The ABA Standard, to which the Rhode Island Supreme Court specifically referred the trial judge on remand, is intended to cover precisely the present situation, and not merely by analogy to physical restraint. The Commentary to the relevant action explicitly states

rejected as well by both of the federal courts to have reviewed this case, and is demonstrably at odds with the vast majority of considered lower court opinions. See *Dorman* v. *U.S.*, 435 F.2d 385, 398 (D.C. Cir 1970) (*en banc*); *Kennedy* v. *Cardwell*, 487 F.2d 101 (6th Cir. 1973), *cert. den. sub. nom.*, *Kennedy* v. *Gray*, 416 U.S. 959 (1974); *U.S.* v. *Jackson*, 549 F.2d 517 (8th Cir. 1977), *cert. den.*, 430 U.S. 985 (1977).

Petitioners now would minimize the difference between the impression made on a jury by an identifiable four-man security force of state troopers—wearing boots, hats, impressive uniforms, and guns, and sitting in a row directly behind the defendants—and the impression that would be created by a plainclothes force placed inconspicuously around the room. The Supreme Court of Rhode Island, and federal district court for the District of Rhode Island, both familiar with the Rhode Island State Police, obviously held a radically different view.[42] Far from being innocuous, this ostentatious display of intentionally intimidating force was described as "a departure," "unusual," "totalitarian," "extreme"—and therefore presumptively prejudicial—even by the local courts that *upheld* the trial court's decision.

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that

> The restraint in question [in § 4.1(c)] includes. . . . the presence of many law enforcement officers. . . . a showing of need should be required whenever custodial officials have decided to subject a particular defendant . . . to guard *beyond that customarily employed*. *Commentary* to ABA Standard § 4.1(c) at p. 94. (emphasis added)

[42] Thus, contrary to petitioners' current arguments, Br. Pet. at 18-21, and in the absence of contradictory evidence in the record, *Sumner* v. *Mata*, 449 U.S. 539, 545 (1981), requires this Court to take as a given that the use of state troopers for courtroom security details was highly unusual in the locality and a cause for unusual concern. Contrary to many arguments now raised, it is *that* finding which federalism and comity require be accorded 28 U.S.C. § 2254's "presumption of correctness."

B. Given The Presumptively Prejudicial Nature Of This "Armed Camp" Atmosphere, The Exceptional 'Security' At Respondent's Trial Could Not Constitutionally Be Imposed Without A Specific Showing Of Exceptional Need And Careful Consideration Of Less Prejudicial Alternatives.

When the state seeks to encroach upon fundamental liberties such as the right to a fair trial, it must first demonstrate *both* that a compelling state interest is at stake, *and* that no less intrusive means is available to insure that the state's interest is served. *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *FEC* v. *NCPAC*, ___ U.S. ___; 105 S.Ct. 1459; 84 L.Ed.2d 455 (1985); *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. ___, 105 S.Ct. 3249; 87 L.Ed.2d 313 (1985), *Zablocki* v. *Redhail*, 434 U.S. 374 (1978). Neither of these elementary requirements was even remotely satisfied here.

1. The Need For A Particularized Showing And The Exploration Of Less Prejudicial Alternatives Is Well Established.

This Court established in *Estelle* v. *Williams* that the state policy needed to justify the use of a state-imposed trial practice with a probability of prejudicial impact on a criminal trial jury must be an "*essential*" one, and

> That it may be more convenient for jail administrators [to impose such a technique] provides *no* justification for the practice.

Estelle v. *Williams*, *supra* at 505 (emphasis added). Accordingly, whenever circumstances require such practices to be used, *Illinois* v. *Allen*, *supra*, or when the involvement of another fundamental liberty—such as freedom of the press—prevents the courts from forbidding presumptively prejudicial practices outright, *Nebraska Press Assoc.* v. *Stuart*, *supra*, this Court has required trial courts to explore every possible means for minimizing the potentially prejudicial impact of trial practices that tend to impair the presumption.

In accordance with these principles, even though lower state and federal courts have approved the use of armed guards during trials, the vast majority of courts that have done so, particularly since this Court's decisions in *Illinois* v. *Allen* and *Estelle*, have applied far closer scrutiny to the question than the trial judge did here. In the leading case, *Kennedy* v. *Cardwell*, *supra*, the Sixth Circuit noted, in an exceptionally thorough opinion, that all but "a distinct minority" of cases recognize the prejudice inherent in the use of courtroom restraints and that only "special circumstances" (relating to "the temperament and personal characteristics of the defendant," 487 F.2d at 104) warrant their use. *Id.* at 107-108.[43] And, although *Kennedy* itself concerned the use of shackles in addition to uniformed officers, that court placed particular emphasis on the "placement of guards in relation to the defendant" in

[43] In most post-*Estelle* state court cases involving considered responses to the issue of courtroom security, courts have followed the precepts set forth in *Kennedy*, and recognized the need both to articulate a special reason why the practice is required to maintain order as well as the importance of minimizing the impact of the unusual security measures on the jury, once the need for them has been shown. *See, e.g., State* v. *Bolder*, 635 S.W.2d 673 (Mo. 1982) (extremely disruptive defendant); *State* v. *Tolley*, 226 S.E.2d 353 (N.C. 1976) (need to "minimize" and requirement of cautionary instruction). *See also Anthony* v. *State*, 521 P.2d 486 (Alaska 1974). In these cases, the courts identify and rely on special factors relating to the *trial*, not administrative logistics. Moreover, although the contexts in which courts have confronted issues of courtroom security are extremely factually diverse (and deserving of the most thorough factual review), few, if any (including those cited by petitioners, Br. Pet. at 35, n.16), combine as many adverse factors ("high profile" nature of "security," lack of need, failure to investigate alternatives, failure to provide corrective instruction, reliance on "convenience," "notoriety" and publicity of the case, etc.) as are presented here. Moreover, some of the decisions cited with approval by petitioners are, to put it mildly, egregiously wrongly decided. *See, e.g., State* v. *Gove*, 185 S.E.2d 826 (S.C. 1971) (36 officers, including 24 in uniform, inexplicably attend a minor "breaking and entering" trial).

discussing cases where guards alone were used. The advantage of guards over shackles, it said, was that

> Guards can be strategically placed in the courtroom when more than normal security is needed and can be hidden in plainclothes, [so that] the jury never needs to be aware of the added protection so that no prejudice would adhere to the defendant." *Id.* at 109.*Id.*

It held such steps to be critical, because "guards seated around or next to the defendant during a jury trial are likely to create in the minds of the jury that the defendant is dangerous or untrustworthy." *Id.* at 108.[44]

The District of Columbia Circuit has similarly held *en banc* that,

> When a judge conducts a trial in a way that can only impress upon the jury the dangerousness of the men on trial, this impartial search for truth aborts. Therefore, the judge should be at pains not to act precipitately . . . he

[44] Thus petitioners' argument concerning the First Circuit's supposedly "supervisory" inquiry into state court proceedings, Br. Pet. at 23-28, entirely misapprehends the relationship between the First Circuit's inquiry into available administrative alternatives and the prejudicial practice at issue here. Like the Sixth Circuit in *Kennedy* and this Court in *Shephard* v. *Maxwell*, and *Nebraska Press Assoc.*, both *supra*, the First Circuit reviewed less prejudicial alternatives, not to exercise "supervisory" control, but to demonstrate that the imposition of this highly prejudicial form of in-court security "further[ed] no essential state policy," *Estelle* v. *Williams*, *supra* at 505, that could not have been accomplished equally well in other, less prejudicial ways.

Petitioners' additional suggestion that the Circuit engaged in inappropriate second-guessing of a front-line trial court judge, citing *only* Fourth Amendment cases having to do with the standard for judicial review of law enforcement agents' on-the-spot investigative decisions, Br. Pet. at 24-25, is even more erroneous. This Court has never suggested that judicial choices made after evidentiary hearings are subject to the same exigencies, and deserve the same leeway, as split-second decisions made by police officers on the street.

> should shackle the defendants in court, whether with chains *or with marshals, only on a clear showing that the defendants pose an immediate threat to the peace and order of the trial.*

Dorman v. *United States*, 435 F.2d 385, 398 (D.C. Cir. 1970) (*en banc*) (emphasis added) (approving one-to-one defendant/marshal ratio after defendants appeared late for trial and menaced witnesses). Likewise, in upholding the use of five *plain clothes* marshals (for a one-to-one ratio), in *United States* v. *Jackson*, 549 F.2d 517, 526-7 (8th Cir. 1977), the Eighth Circuit emphasized that, unlike here,

> The jury was carefully shielded from contact with an awareness of the security measures in effect in the course of the trial . . . because the security measures were implemented in a manner which did not deprive defendants of the physical indicia of innocence. *Id.* at 527.

Indeed, in that case, unlike here, extra care was taken to ensure that jurors would not even be aware of the marshals and metal detector *outside* the courtroom. *Id.* at 527, n.8.[45]

The ABA Standard to which the state Supreme Court specifically referred this trial judge, and whose Commentary summarizes the actual practices of our trial courts, similarly

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[45] Indeed, even *Hardee* v. *Kuhlman*, 581 F.2d 330 (1978), where a divided panel of the Second Circuit upheld, without a special showing, the use of armed guards for defendants solely because they were not admitted to bail, does not support petitioners' position nearly as much as they believe. That opinion was based on the fact that it was "the custom in that court" always to use such guards where the defendants were not on bail. 581 F.2d at 331. Here, the state Supreme Court specifically found the practice at issue to be unusual in the vicinity, *Byrnes I*, *supra*, and therefore much more likely than the security ordinarily used at trials involving non-bailed defendants to attract special attention among the jury. See also *State* v. *Pugliesi*, *supra*. It is precisely this "unusual in the locality" test that triggers the ABA rule, ABA *Commentary* at 94, and which raises possible equal protection violations. *See* p. 37, n.48, *infra*.

requires a judge to find "*exceptional* circumstances" making the special security measures "reasonably necessary *to maintain order*" in the courtroom before permitting such an extraordinary in-court show of force. ABA *Commentary supra* at p. 95 (emphasis added). Under that Standard, a judge may not assume, as this judge conceded that he had,[46] "that the officials responsible for custody of the incarcerated person are entitled to decide the need for physical restraint at trial." *Commentary supra* at p. 95. Rather, there is an affirmative duty for the trial court to focus on "*particular* harm[s]" at the trial, ABA *Commentary* at 95 (emphasis added), necessitating the unusual in-court measures. The harms courts have considered are the actual potential for "escape, interruption of proceedings, attack upon the defendant or witness by others, attack upon others by the defendant or witness, or self-destruction," and in making their judgments they have considered evidence concerning a dozen different factors going to these "particular harms." ABA *Commentary* at p. 96 n.9.[47] Not a single one of these twelve factors was considered or relied upon by the trial court here, and the one consideration upon which it did rely—the failure of defendants to be released on bail—is not on the ABA's list of *either* identifiable harms *or* likely probative factors.

Given the intrinsic risk to a defendant's fundamental rights raised by the imposition of unusual courtroom security, the

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[46] His inquiry, he said, concerned, "whether security *not* courtroom security, but security that is in the first instance the responsibility of the warden . . ." (T. 255). (emphasis added)

[47] According to the ABA, the kinds of facts relied on are: (1) the seriousness of the present charge; (2) the person's character; (3) the person's past record; (4) past escapes by the person; (5) attempted escapes; (6) evidence the person is planning an escape; (7) threats of harm to others; (8) threats to cause disturbance; (9) evidence the person is bent upon self-destruction; (10) risk of mob violence; (11) risk of attempted revenge by victim's family; (12) other offenders still at large.

Constitutional concern must always be to ensure that the level of security is commensurate with the level of the risk. Yet the trial judge here, convinced before a jury had even been selected that the challenged practice was not his responsibility and did not raise even a "risk" of "diluting" the defendants' rights, *Estelle* v. *Williams*, *supra*, at 504-505, ended by "balancing nothing" in determining whether any extraordinary risk actually justified this unprecedented in-court show of force. Moreover, even in their own terms, the trial court's conclusions lack "fair support" in the record below.

2. In View Of This Court's Ruling In *Estelle* v. *Williams*, The Record In This Case Cannot "Fairly Support" The Trial Court's Finding Of Necessity, Or Demonstrate Adequate Consideration of Less Prejudicial Alternatives.

a. The Necessity For Unusual Security.

Rejecting the defendants' requests that it hold a particularized hearing to determine whether any extraordinary risk justified the extraordinary security measures being imposed at their trial, the trial court instead articulated an overly broad *per se* rule—that failure to be released on bail by itself suffices to justify whatever security measures administrative considerations make convenient. It then defined the object of its hearing on "necessity" strictly in terms of deciding which administrative considerations were involved. Given such premises, it is not surprising that the results of its inquiry are far from sufficient to provide "fair support" for a constitutionally adequate finding of need. Neither the trial judge's rationale, nor those suggested by petitioners, establishes the necessity that the Constitution requires.

First, and most obviously, this "armed camp" atmosphere cannot be justified, as the trial court attempted to, by the mere fact that the defendants had not been released on bail. If a failure to make bail sufficed as a reason for such highly unusual "security," the Rhode Island Supreme Court, which was aware of the defendants' bail status when it made its interlocutory

ruling, would never have remanded the case for a hearing concerning "need." Conversely, given the fact that the "normal" complement of committing squad officers had not been available for "a couple or three years," if failure to make bail actually did establish "necessity," security resembling that imposed at respondent's trial ought to have been (but, of course, was not) commonplace.[48]

Bootstrap aguments based on administrative convenience (what the Superintendent "deems," non-existent contract "requirements," alleged manpower shortages, overtime pay differentials, the inconvenience of redeploying committing squad officers, etc.), even when added to the defendants' failure to have obtained bail, fare, if anything, even worse. "The Constitution serves higher values than efficiency," *Stanley* v. *Illinois*, 405 U.S. 645, 646 (1972), and the fundamental right to a fair trial is surely one of these. *See Estelle* v. *Williams*, *supra*. To this day petitioners have cited *no* special factors concerning the harms posed by these defendants or this trial to explain why it was "essential" for these troopers to be in intentionally intimidating, highly identifiable uniforms—wearing hats and boots and guns, and seated directly behind the defendants—rather than scattered throughout the courtroom in plain

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[48] Moreover, predicating enhanced security on the defendants' failure to be released on pretrial bail is particularly inappropriate here, where following trial, the convicted defendants were released on bail pending appeal. In addition, reliance on a failure to be released on bail only raises a further constitutional deficiency in respondent's trial: a denial of equal protection. Under these facts, it is clear that respondent was unjustifiably singled out for special treatment *as among* non-bailed defendants. Moreover, if this Court rules that such security may automatically be imposed whenever a defendant is not free on bail, it will necessarily be setting different standards for the fair trial rights of those too poor to secure pre-trial release or those charged with serious, as opposed to minor crimes. *But see Estelle* v. *Williams*, *supra* at 505-6; *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Irwin* v. *Dodd*, *supra*. *See also Bearden* v. *Georgia*, 461 U.S. 660 (1983).

clothes. Even if a need for heightened "security" had been established, which it never was, the mere existence of that need still would not by itself suffice to establish that the uniquely identifiable *form* of in-court security imposed here was constitutionally "essential."[49]

Nor, finally, was the atmosphere at trial justified by the supposedly "normal" level of courtroom security staffing—the supposedly "normal" two-to-one ratio—upon which the entire case for heightened security rests. The testimony of the Captain of the committing squad shows unmistakably that the two-to-one ratio was what he *liked*, not what he *did*. Although the Captain said that a two-to-one ratio was "normal," his testimony demonstrates clearly that "optimal" was what he *meant*. (T. 117). What his testimony therefore demonstrates is that these defendants were being singled out, not just in terms of the *kinds* of officers providing security, but in terms of number of the officers, too.

Ultimately, of course, the trial judge *admitted* that he had misunderstood the intent behind his Supreme Court's order directing him to determine courtroom "need." Conceding that, if the state Supreme Court knew the defendants were being held without bail when it told him to hold a hearing his post-remand decision was necessarily beside the point, he failed to correct or reconsider that decision after he was confronted

[49] Thus, the First Circuit's vividly expressed astonishment that the state was relying on the mere possibility that a union grievance might be filed, 749 F.2d at 962, (for the first time ever, so far as this record shows), is entirely appropriate. This is all the more true when Major Benjamin's testimony reveals that the much-feared grievance would not, even if it were filed, be supported by any actual provision in the troopers' contract. In truth, the record "fairly supports" only one conclusion: that the decision to use uniformed officers was a discretionary decision made by the State Police leadership, not because they feared a foundationless union complaint, but because they *wanted* their officers to be "identifiable" in court—for the impression they made on the jury and for general deterrence "*as well.*" (T. 154).

with the fact that he had followed the wrong track from the start. As a consequence, neither his ruling nor the evidence underlying it are "fairly supportive" of the idea that this exceptional security was justified by any constitutionally relevant, let alone adequate, showing of "essential" need.

b. Consideration Of Alternative Means.

The trial judge both failed to investigate the potential availability of less prejudicial means for accomplishing legitimate courtroom "security" objectives, and rejected out-of-hand every less prejudicial alternative that the defendants proposed.[50]

As shown in detail in the foregoing Statement, he declined: (1) to consider requiring the troopers to appear in less intimidating attire or courtroom deployment patterns; (2) to inquire whether the state police really were the only back-up force available; (3) to allow the defendants to pay the salary differential between plain clothes and uniformed state police personnel; (4) to order severance (which, like bail, if granted to any two defendants would under the "two-to-one" theory solve the problem for all six); (5) to examine seriously defendants' promises and demonstrated record of good behavior; (6) to review the previous bail ruling in light of its unforeseen effect; (7) to accept the defendants' offer to waive a public trial; and (8) to direct the committing squad to adjust its complement of guards

[50] Petitioners' argument that the defendants conceded that committing squad officers would have been acceptable, Br. Pet. at 23-25, is plainly not supported by the record below. It is clear that defendants and their counsel were trying *everything* in their efforts to move (or *re*move) these troopers, including temporarily sacrificing their right to be present at trial. They can hardly be deemed to have voluntarily waived their right to a fair trial simply because they attempted to exercise "damage control" once it became clear that the judge was set on letting their rights be infringed. This is not a conscious "strategy" choice as in *Estelle*, much less a voluntary "waiver."

to comply with defendants' offer to rotate through their trial so as to eliminate the declared reasons for needing the uniformed state police.

To the contrary, despite a direct order from his state Supreme Court that he *assert some control*, he could not muster the authority to instruct these conspicuously armed and uniformed State Police officers *standing* in his courtroom while the court was still in session, with their boots and guns and official trooper hats on, that they should *sit down*. Far from fulfilling his obligation to "govern" his courtroom when unusual circumstances arise, *Quercia* v. *U.S.*, 289 U.S. 466, 469 (1933),[51] he merely speculated, as though he were a casual spectator, that "maybe they have their orders."

That his reasons for failure to accept "*less* totalitarian alternatives" might have been "rational," 481 F. Supp. at 998, is irrelevant: on this record, the Constitutional duty to subject defendants to "armed camp" trial conditions *only* if "essential," and *only* as a last resort, simply was not met.

II. Pretrial Voir Dire Cannot, And Did Not, Protect Against The Presumptive Prejudice Attached To The Unnecessary Use Of Unusual Courtroom Security.

Consistent with his failure to appreciate what his state Supreme Court intended when it rejected his initial conclusion (first expressed before *voir dire* even began, T. 49, 72) that no

[51] *See generally* N. Dorsen & L. Friedman, *Disorder in the Courts* (1973) at 192, *et seq.* (responsibility of the judge); 244 *et seq.* (the need to give special care to managing security personnel). Indeed, this trial court was startlingly passive. Despite his duty to control his courtroom, and a direct state Supreme Court command, on the basic issue of guaranteeing defendants a fair trial he deferred to others on every available occasion, including, *inter alia*, to (1) the "security committee"; (2) the committing squad ("I'll have to see what they do if defendants absent themselves"); (3) the state police (deployment, arms, attire); (4) his coordinate brother (bail); and, when all else failed, (5) the juror's answers on *voir dire*.

question of potential prejudice was raised, and ordered a hearing on necessity, the trial judge sought to satisfy his post-remand mandate, and "cure" the problem of potential prejudice, by referring to a "sample" of the *voir dire* responses of prospective jurors to questions concerning the troopers. He contended, as the state does here, that these answers prove prejudice did not exist.

This approach is entirely inadequate and insufficient, both in theory and in practice. As a matter of law, *voir dire* is not, and cannot be, constitutionally sufficient to protect against after-arising prejudice caused by a consciously chosen state policy that is imposed over defense objection in the absence of "essential" need. Moreover, the "sample" this judge relied on does not provide anything approaching "fair support" for the conclusion that he drew. To the contrary, it proves the opposite.

1. Pre-Trial Voir Dire Cannot Validate The Unjustified Use Of A Presumptively Prejudicial State-Imposed Trial Practice Over A Timely Defense Objection.

This Court has repeatedly stressed the critical importance of taking preventive rather than corrective action to protect the right to a fair trial whenever such action is possible. As the Court has always recognized, in the real world, "as one of the jurors put it, 'You can't forget what you hear and see.'" *Irwin* v. *Dowd*, 366 U.S. at 728. Given the intangible yet ineradicable nature of "atmospheric" prejudice,

> reversals are but palliatives, the cure lies in those measures that will prevent the prejudice at its inception.

Sheppard v. *Maxwell*, 348 U.S. at 363. And the Court's insistence on prevention over correction has only been heightened where the potentially contaminating influences concern events that, while forseeable, have yet actually to occur—prejudicial news coverage of the trial itself is but one example—because *all* "judgments concerning the impact of such events, on prospective jurors [are] of necessity speculative," and based on "factors unknown and unknowable." *Nebraska Press Assoc.*,

427 U.S. at 563.[52] It has therefore imposed upon criminal trial courts an affirmative constitutional duty to

> be *alert* to factors that *may* undermine the fairness of the fact-finding process. In the administration of criminal justice, *courts must carefully guard against dilution* of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.

Estelle v. *Williams*, 425 U.S. at 503 (emphasis added).

Consequently, as the transcript of the oral argument in *Estelle* v. *Williams* makes clear, this Court has already *unanimously* held that a continuing non-verbal courtroom "reminder" that the defendant had not been released on bail cannot constitutionally be permitted over a timely defense objection *even if* the prospective jurors deny its potential prejudicial impact upon pretrial *voir dire*.[53] Instead, the Court held

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[52] Although petitioners rely on the fact that in *Sheppard* v. *Maxwell*, 384 U.S. 333, 358 (1966), the Court "[criticized the] trial judge for failure to question jurors on possible effects of pre-trial publicity," Br. Pet. at 19, the real thrust of *Sheppard* was to criticize the trial judge because he

> never considered other means that are often utilized *to reduce* the appearance of prejudicial material and *to protect* the jury from outside influences.

384 U.S. 333, 358 (emphasis added). Thus, the Court did not primarily criticize the trial judge for his failure to ask questions; it criticized him for not *doing something*. Thus, *Sheppard* actually supports the distinction urged here. *Voir dire* is the only means available to protect against *pre*-trial publicity, but additional steps, such as sequestation, must also be required in appropriate cases to guard against potentially prejudicial influences that are forseeable, but have yet actually to occur.

[53] The Court's ruling in *Estelle* was, so far as *voir dire* is concerned, rendered in the same factual posture as is presented here. At oral argument, the Court asked and was advised that the prospective jurors in that case indicated upon explicit pre-trial *voir dire* that their judgment would be unaffected by seeing the accused tried in prison clothes. (Or. Arg. T. at 7). It also asked and was informed that no curative instruction had been given. *Id.*

that, because the "actual impact of a particular practice cannot always be fully determined," especially in advance, any courtroom practice raising even a "*risk*" or "*probability*" of impairing a defendant's right to the presumption of innocence must be given "close scrutiny," and be eliminated upon defense request unless the practice is *required* by an "essential" state policy. 425 U.S. at 504-5 (emphasis added).[54] What is true for the clothing of the defendant cannot be less true for the placement and clothing of his guards: by its very nature, *voir dire* cannot be more effective in protecting, in advance, against the one than in protecting, in advance, against the other.[55]

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[54] *Estelle* is, moreover, consistent with a long line of decisions establishing that certain state-imposed procedures occurring in criminal trials are inherently prejudicial and unlawful notwithstanding subsequent corrective instructions, let alone before-the-fact *voir dire*. See, e.g., *Burgett* v. *Texas*, 389 U.S. 115 (1967) (erroneous introduction into evidence of unconstitutionally-obtained prior conviction); *Burton* v. *United States*, 391 U.S. 123 (1968) (erroneous introduction of defendants' confession, with instruction that it be used as evidence only against a co-defendant).

[55] Indeed one post-*Estelle* social science study, directed at *precisely* the question presented here—the subliminal effect on jurors of the accused's appearing at trial in street clothes, but under heavy guard—has concluded that, under such circumstances, a defendant runs a *greater* risk of jury prejudice than a defendant appearing in prison clothes with the same complement of guards. Fontaine and Kiger, *The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study*, 2 Law and Human Behavior, 63 (1978). This study shows, as the Court surmised in *Estelle*, that some jurors apparently react with sympathy when a defendant appears in prison garb. However, if the accused appears in street clothes with guards, this sympathic juror reaction disappears, and jurors conclude *only* that the defendant must be an especially violent or dangerous—and *therefore guilty*—person. Thus, if there is any distinction to be drawn between the prison garb at issue in *Estelle* and the extraordinary security measures at issue here, it can only be that armed guards are even *more* likely to be prejudicial to an accused, and thus even less susceptible to "correction" through before-the-fact *voir dire*.

To be sure, *voir dire* may be one of the few devices realistically available, and therefore more constitutionally acceptable, to correct for pretrial prejudice, *Sheppard* v. *Maxwell*, *supra*, or for the effects of factors that are beyond the courts' constitutional power to control. *Nebraska Press Assn.* v. *Stuart*, *supra*. But the same cannot be true when the prejudicial practice has yet to happen, is imposed over the defendant's objection, and involves a deliberate, state-selected, in-court procedure that can still be avoided. This case does not involve uncontrollable, unforseeable, unintentional events, with which conscientious courts must deal as effectively as circumstances allow. It concerns a consciously chosen, deliberately-imposed "established state procedure" directly affecting the enjoyment of a fundamental right. *Compare Paratt* v. *Taylor*, 451 U.S. 527 (1981) with *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 435-7 (1982). In such circumstances, a citizen whose right will be infringed is entitled to a finding, in advance, that the "established state procedure" is "essential," *Estelle* v. *Williams*, before that state procedure may be allowed to override his right. *Logan* v. *Zimmerman Brush Co.*, *supra*. And if the state fails to make the requisite showing, as it has plainly failed to do here, the "established state procedure" *cannot* be imposed, *regardless* of the existence of any "curative" devices such as *voir dire*, that are, at best, only partially effective. This Court would not condone a denial of counsel, or compulsory self-incrimination simply because fifty-one potential jurors testified on pre-trial *voir dire* that these Constitutional violations would not "affect their judgment." It can no more allow the same *voir dire* answers to "cure" the unjustifiable burden here imposed on the presumption of innocence.[56]

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[56] This is all the more true since the relevant social science data uniformly confirm that, during the course of a trial, irrelevant and/or unstated factors inevitably condition jurors' responses in ways the jurors themselves do not perceive (and are, therefore, unlikely to be able to foresee). *See e.g.*, H. Kalven & H. Zeisel, *The American Jury* (1966). Among the most significant of these are factors relating to the attractiveness or unattractiveness of the defendant. *Id.* at 214-218.

Because the issue presented by this case is thus a legal one, concerning the need to take preventive steps in order to avoid unnecessary prejudice arising from state-imposed in-court practices, this Court's recent decisions cited by petitioners to establish that the First Circuit overstepped a federal *habeas* court's proper bounds in no way contradict the sound result reached by the First Circuit here.[57] Since *voir dire* is insuffi-

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The American Jury therefore concludes that dress, bad behavior, or other visible courtroom factors which place the defendant in a bad light *inevitably* cause juries "not [to] give the benefit of the doubt . . . to those defendants." *Id.* at 382. More recent work agrees. See Kaplan, "Cognitive Processes in the Individual Juror," in *The Psychology of the Courtroom*, 203-4 (N. Kerr & R. Bray ed. 1982) ("unsettling trial conditions" especially likely to produce verdicts of guilt); Hans & Widmar, "Jury Selection" in N. Kerr and R. Bray, *supra at 62*, (in unusual situations, potential jurors are especially unable to estimate the effects of bias on their behavior); C. Bartol, *Psychology and American Law*, 156-7 (1983) (jurors are susceptible to the "just world hypothesis"; *i.e.*, that defendants' appearances suggest whether they deserve their fate); Comment, *Legal Approaches to Juror Stereotyping By Physical Characteristics*, 1 Law and Human Behavior, No. 1, 87 (1977) (stereotyping not susceptible to cure by procedural safeguards because it is a hidden influence). Indeed, in connection with the hotel burglary, the trial judge *himself* expressed skepticism concerning the value of *voir dire* as an accurate means of testing for prejudice, even with regard to prior, completed events. (T. 3690-1).

[57] In an attempt to create a federalism issue to obscure the fact that a constitutional violation is in fact at stake, petitioners expend great effort to "establish" that the First Circuit's decision rested upon a rejection of the trial judge's allegedly "historical" factual finding that there was no prejudice. Br. Pet. at 15-20. Unfortunately for this theory, although the First Circuit did indeed express serious and well-founded doubt about the adequacy of the *voir dire* conducted by the trial court, it also straightforwardly declared, "we do *not* rest our decision on such a factual issue." 749 F.2d 961, 965. (emphasis added)

Despite petitioner's contentions, therefore, this case simply does not involve any second-guessing of a state trial court's decision on an

cient as a matter of law to "cure" the present defect, arguments based on the trial court's findings at *voir dire* are, as the First Circuit recognized, simply beside the point, and would be even if they were, as they are not, "fairly supported" by the record.[58] Indeed, examination of the Court's recent decisions concerning "historical fact" merely confirms the distinction between circumstances where *voir dire* is useful, and where it is insufficient as a matter of law, for *all* of those recent cases concern already-completed events or a witness's personal credibility, neither of which is at issue here. See *Patton* v. *Yount*, 467 U.S. ___, 104 S.Ct. 2885, 81 L.Ed. 2d 847 (1984) (pre-trial publicity); *Marshall* v. *Lonberger*, 459 U.S. 422 (1983) (defendant's credibility concerning facts relating to entry of a guilty plea three years earlier); *Rushen* v. *Spain*, 464 U.S. 114 (1983), (past *ex parte* contact).[59]

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issue of "historical fact," and all of petitioners' arguments based on 28 U.S.C. ¶ 2254(d) are inapposite.

[58] Claiming "that nothing on this record supports . . . a claim" that the troopers escorted the defendants to and from the courtroom, Br. Pet. at 21 (emphasis added), petitioners attempt to create the impression that the First Circuit was careless in its reading of the record.

In reality, however, petitioners are the ones who are mistaken. First, Major Benjamin himself testified that his troopers' job was precisely to escort the defendants from the Adult Correctional Institution "along the highway, *into this courtroom* and continue" doing so "right on until the adjournment of the trial." (T. 140) (emphasis added). The record also makes clear that the troopers did have physical contact. *See supra* at p. 9, n.15. Far from being "gratuitous and unwarranted," Br. Pet. at 22, the First Circuit's conclusion that the troopers brought the defendants to court evidences an exceptionally *careful* examination of the record, not an unusually casual one.

[59] In all of those cases, moreover, the Court's conclusion that the record "fairly supported" the trial judge's finding was based upon its own review of the *voir dire* transcript. In this case, where no such transcript was ever reviewed, the requisite showing of "fair support" has, by definition, never been made. Consequently, *Sumner* v. *Mata*,

That *voir dire* can tell, after the fact, whether prejudice has been generated does not mean that it can predict the possibility of prejudice in advance. That it suffices for past or unplanned events, whose prevention is impossible, does not mean it is sufficient to relieve a trial court of its duty to use careful *preventive* scrutiny where the dangers to be guarded against arise from planned, intentional, in-court policies imposed by the state against a criminal defendant over his objection. Neither the prior decisions of this Court, *see generally Nebraska Press Assoc.* v. *Stuart*, *Sheppard* v. *Maxwell*, *supra*, nor the American Bar Association's careful study, nor the relevant social science literature contains any suggestion that *voir dire* can serve a constitutionally acceptable "curative" function in the circumstances presented here.[60] To the contrary, "reason,

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449 U.S. 539, 545 (1981), cited at Br. Pet. at 19, is inapposite. Because it did not have a *voir dire* transcript, the Rhode Island Supreme Court (like the federal district court, which relied on it) was manifestly wrong to say it had "reviewed the record."

[60] The ABA, while plainly not condoning the imposition of exceptional security merely because a defendant happens not to be free on bail, is also most emphatic about the indispensability of a corrective instruction when exceptional security is imposed. In any such case,

> it is *of the essence* that [the judge] instruct the jury *in the clearest and most emphatic terms* that it give such restraint no consideration whatever in assessing the proofs and determining guilt. This is *the least* that can be done toward insuring a fair trial. *ABA Commentary* at 97.

Indeed, the likelihood that jury prejudice will arise from seeing the defendant subjected to unusual security measures requires giving a corrective instruction even "when *through inadvertence* some jurors have *momentarily* viewed the defendant . . . in restraint." *Id.* (emphasis added)

As noted, *no* such instruction was given here, nor does the charge reflect any instruction that the jurors should disregard the fact that the defendants were in custody—as the "sample" suggests the jurors knew. Moreover, under settled state law, there was no burden on defendants even to request one. *State* v. *Pugliesi*, *supra*.

principle, and common human experience," *Estelle*, *supra* at 504, all make clear that it cannot.

2. Examination Of The Voir Dire Conducted In This Trial Confirms Both The Inadequacy Of Voir Dire As A Means Of "Curing" Unjustified Security Measures And The Absence Of "Fair Support In The Record" For The Conclusions Of The Trial Judge.

The *voir dire* "sample" taken by the trial judge confirms both the constitutional inadequacy of *voir dire* generally as a "corrective" device against inherently prejudicial in-court practices intentionally imposed by the state, and the absence of "fair support in the record" for the trial judge's conclusion that there was no prejudice here. It thus confirms not only that the requirement of a prior showing of necessity for extraordinary courtroom security is constitutionally essential as a "question of law," but that a writ of *habeas corpus* would have to issue here even if the trial court's ruling were deemed one of "historical fact."

In the first place, this *voir dire* was conducted in a manner that could not have been better *calculated* to produce unreliable results. The court's attempt to diminish potential prejudice by having the troopers present during the *voir dire*, even though the defendants were not, was, in the absence of an instruction, most likely *counter*productive. Asking "a question . . . seeking to elicit from them what reason they may have had in their mind for the presence of the troopers," when the troopers are there and the defendants are not, will not and cannot elicit any information regarding what the jurors will think once they are actually subjected to the troopers' "continuing influence," *Estelle* v. *Williams*, *in* the defendants' presence, especially after *voir dire* has drawn the jurors' attention to the fact that there was something unusual about the troopers' being there.[61]

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[61] Previously, one juror ". . . hadn't thought about it" (T. 232); another said "It never entered my mind why," *Id.*, and a third stated "I don't know if this is the common thing, I don't know why" . . . (T. 232).

Thus, if thirteen of the fifty-four jurors said they "didn't know" why the troopers were at the *voir dire*, this hardly constitutes "fair support in the record" for the assumption that they would not *subsequently* arrive at prejudicial conclusions as to why the troopers were there, once they saw these conspicuous officers constantly guarding the accused. The same is true for the ten jurors who answered "security." Such answers do not "fairly support" the assumption that those jurors did not think it was *their* security *from* the defendants that was at stake. Indeed, by focusing the jurors' attention on the trooper's presence, and then leaving them free to speculate for two and a half months about why the troopers were there, this use of the *voir dire* process most likely aggravated the risk of prejudice.[62]

Moreover, as the First Circuit noted, 749 F.2d at 965, juror answers to questions relating to potential "inferences of guilt" that "might" be created by what were (from the jurors' perspective) unexplained, totally hypothetical future situations are inherently unreliable. In addition, as this Court has recognized, and the social science data confirms,[63] even when

> each juror was sincere when he said that he would be fair and impartial to petitioner, . . . but the psychological

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[62] A further ambiguity in the *voir dire* results bears not only on the presence of the troopers in the courtroom, but on the more general question of the courthouse "armed camp" atmosphere. One of the jurors quoted by the trial judge plainly did not understand whether the questions concerned the troopers "present" in the courtroom, or the other troopers "present" outside, or both, saying "I believe they are here because this is a courtroom, but there are two of them on the outside . . . and I don't know why" (T. 232) It is easily possible, therefore, that *all* of the jurors who answered "security" may well have been thinking of the troopers *as a whole*; and there is no contradiction between thinking that the troopers, as a whole, are present "for security" and thinking that the troopers *in the courtroom* have some *special* security duty on account of the special dangers *these* defendants posed.

[63] *See* studies cited at n.56, *supra*.

> impact requiring such a declaration before one's fellows is often its father. *Irwin* v. *Dowd*, *supra* at 728.

The distorting "psychological impact" of the current *voir dire* was of course even more severe than that generated by being examined before one's fellow members of the venire.

In this case, in a courtroom where only a judge, prosecutor, handful of defense attorneys, and a number of uniformed State Police, wearing guns, boots and hats, were present, the potential jurors were apparently expected to look the State Policemen in the eye and say, "Yes, these fellows prejudice and intimidate me." It is not surprising that so many of them equivocated. As it was, the "psychological impact" of the *voir dire* was so unusual and intimidating that two of the potential jurors, ignoring the question concerning possible "inferences of guilt," "went on directly" to volunteer that the troopers and their guns made them "very nervous"—and one even attached these nervous feelings to, in particular, "the trooper's *uniform*."

The trial judge's "sample" of the attitudes of the thirty-one prospective jurors answering something other than "don't know" or "security" when asked why they thought the troopers were in attendance, far from providing "fair support" for the trial judge's conclusion, actually *contradicts* his sanguine view. All those who expressed the idea that the troopers were present for "protection," like those who answered "security," left the question perfectly open as to whether it was "bad, violent" defendants (or, worse yet, hypothetical out-of-court accomplices planning a courtroom raid) from whom "protection" was deemed necessary. Saying that the troopers "are here because the defendants are here,"[64] as several of these jurors did, is hardly "fair support" for the conclusion that the jurors did not

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[64] Or "because of the kind of case this is," or "because they are prisoners and are being held," or "because they escorted them here and escorted them back," or "because the defendants are locked up."

think the defendants were "bad characters" who must be kept in custody. To the contrary, it clearly suggests that they did.

Finally, the false but inexplicably never-corrected notion held by two of the "sampled" jurors, that the troopers were there "because the judge asked them to be here" hardly suggests a lack of prejudicial impact but rather, if anything, that the jurors thought there was some danger or threat of which they had just not been apprised. The one juror who speculated that "it may be the way all criminal cases are taken care of," the only faintly neutral comment in the sample, was suspectible of being advised of his error by the other juror whose previous jury service the judge had said he hoped would be transmitted and shared among the panel. Indeed, one particularly troublesome *voir dire* answer in the sample—that "some panelists thought it was strange that the troopers were here"—strongly suggests that the entire venire had been contaminated.

Review of the *voir dire* evidence relied upon here thus only confirms the wisdom of this Court's ruling in *Estelle*, that inherently prejudicial, state-imposed courtroom practices must be forbidden as a matter of law, except upon a proper advance showing of necessity. If the trial judge's "sample" represents the best argument for the *absence* of prejudice, then the prejudice in this trial can only have been very, very real.

III. Under The "Totality Of The Circumstances," Respondent Did Not Receive A Fair Trial.

Any inquiry into the "totality of the circumstances" surrounding respondent's trial must begin with the enormous publicity and local political significance the Bonded Vault case had in Rhode Island. Although petitioners suggest that decisions made "during the heat of a notorious, highly publicized" trial should be entitled to some special deference on Constitutional review, Pet. at 24, when the right to a fair trial is at stake, the relevant Constitutional standard is "close judicial scrutiny," not "excusable neglect." And a "notorious criminal trial,"

such as this one, should if anything be treated with extra Constitutional care. *Estes* v. *Texas*, 381 U.S. at 587 (Harlan, J. concurring).

When confronted with such trials judges must not yield to popular hysteria, but must rise to the occasion instead. *Sacher* v. *U.S.*, 343 U.S. 1, 37-38 (1952) (Frankfurter, J., dissenting). In arguing for special deference toward constitutional decisions in "notorious" cases, petitioners effectively concede that this trial was indeed infected by the notoriety and publicity that surrounded this case. Therefore, despite the thicket of technical niceties involved in contemporary *habeas* jurisprudence, one thing here is unmistakable: This is *precisely* the type of case which has led Congress to create and preserve federal *habeas* review—a case where the totality of the circumstances, for reasons peculiar to the locality, taint, undermine, and ultimately deny the full protection of federally guaranteed rights.

The relevant *habeas corpus* rules—the factors suggested in *Kentucky* v. *Whorton*, 441 U.S. 786, 798 (1979) for determining whether an accused enjoyed a fundamentally fair trial under the "totality of the circumstances"[65]—also all support respondent's claim. Despite the ABA's conclusion that an "emphatic and direct instruction concerning extraordinary security" is "essential" and *"the least"* one can do even where "exceptional circumstances" *require* that extraordinary courtroom security be imposed, the trial court here did no more than give a boilerplate "presumption of innocence" charge. In addition, serious allegations were repeated throughout the trial that the prosecution and state police were systematically harassing, or even arresting the defendants' witnesses, an "arrest" about which at least one of the jurors learned. There was, as well, the hotel break-in, and the extraordinary intervention of the pros-

[65] ". . . all the instructions to the jury, the arguments of counsel, whether the weight of the evidence, was overwhelming, and other relevant factors . . ." 441 U.S. at 798.

ecutor's chief police assistant, a witness in the case, which led the judge openly to doubt whether the jurors' denials of resulting prejudice could really be believed.

And, finally, for all its notoriety, this was not a case where the evidence of guilt was overwhelming. The one disinterested witness who identified Flynn denied to the police for a week following the robbery that she actually had seen him, even though she identified another of the robbers immediately. She was also a witness who participated in a flagrantly unconstitutional "show-up" involving Flynn—so unconstitutional that the state's attempt to defend it consisted *only* in an argument that it was without enduring "taint." And she was an eyewitness whose identification of respondent the judge himself openly acknowledged as being, on more than one point, incredible and unbelievable.

The testimony of the alleged co-conspirators was even less compelling When the state's chief witness implicated Flynn, he thought he was naming a dead man. Too late, he found that Flynn was alive, and that, if he were now to exculpate him, he would face additional charges for perjury.

Most important of all, the jury *disbelieved* the state's alleged co-conspirator testimony to a very significant degree. This jury acquitted three defendants that the "co-conspirator" witnesses implicated *just as fully and completely* as they did the defendants whom the jury convicted. Indeed, the jury convicted some defendants against whom the *only* testimony was given by the same witnesses who also give the *only* testimony against those the jury released.

There is, in short, every reason to believe that this was a classic "compromise" jury verdict. Thus, it seems extremely probable that even though the jury clearly thought the prosecution's chief witnesses had lied, it nonetheless believed that somebody in the courtroom must be guilty of *something*, that it would be a waste of resources (not to say embarrassing) to acquit all these celebrated defendants, and that—given the seriousness of the charges—*some* of the people at defendants'

table must indeed be "bad characters." It is therefore impossible on this record to conclude beyond a reasonable doubt that the "armed camp" atmosphere of the courtroom, and of the courthouse generally, did not indeed tip the balance, and thereby alter the outcome of this case.[66]

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[66] As noted at the outset, notwithstanding petitioners' recent attempt, for the first time in the 10-year history of the case, to deny the facts concerning the troopers on which *all* the opinions in this case rest, Br. Pet. at 11, the Petition for Certiorari concedes that "the number of troopers in the courtroom throughout the pretrial and trial preceedings fluctuated between three and four," Pet. at 4 n.3, and that "the troopers remained in the first row of the spectator section on each day of the trial," Pet. at 4-5.

In addition to the four troopers seated behind respondent throughout his trial, full development of the record would show that numerous other law enforcement officers (both uniformed and plainclothes) in fact also attended every day of his trial, that as many as ten more troopers (and a metal detector, through which everyone entering the courtroom had to pass) (T. 2-947) were stationed in the hallway outside (T. 994, 2-232), and that battle-fatigued state police SWAT teams with shotguns and automatic weapons surrounded the building. Further development of the record would also show that the sequestered jurors in this case had to pass through this intense security gauntlet upon entering and leaving the courthouse every day.

Unfortunately, because the district court denied the petition without a hearing, many of these facts are only hinted at in the current record. Thus, of all the post-trial decisions rendered in this matter, *only* the First Circuit's decision can now actually be upheld, for it is based entirely on legal conclusions which accept the factual determinations of the trial court and the Rhode Island Supreme Court on their face.

CONCLUSION

For the reasons set forth above, the judgment of the First Circuit should be affirmed and the writ of *habeas corpus* should issue forthwith.

Respectfully submitted,

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APPENDIX

APPENDIX A

A Rhode Island State Trooper In Uniform

JANUARY, Superior Court, Providence: *"In split seconds, under heavy guard, suspects in the Bonded Vault case were raced into the court house, leaving photographers almost at a standstill in covering one of the biggest stories of the year. This scene was over in just about 10 seconds."*
WILLIAM L. ROONEY

From the *Providence Sunday Journal*,
January 2, 1977

APPENDIX B

Excerpts from
"In The Service of the State"
(The Rhode Island State Police,
1925-1975)

Published by the Rhode Island Bicentennial Commission Foundation, 1975

Certified Copy of the Entirety,
From the Archives of the
Rhode Island Secretary of State,
On File With The Clerk of
The Court

Public perception has always been an important ally. The character of the personnel, the cruisers, the uniforms; these have always impressed. Page 102

The mere presence of troopers, however, had a strong psyschological impact . . . Page 39

. . . Distinctive uniforms, matched by professional performance, have earned for the Department genuine, popular admiration by several generations of Rhode Islanders. Page 174.

. . . He, and the uniform he wears, provide immediate organizational identity. Page 170

. . . The public identifies him by the uniform he wears . . . they perceive him in his uniform as representing the entire department . . . The citizen sees the uniform of the Department. His perceptions, positive or negative, will be of the enforcement organization that uniform represents. Page 71

Members [of the plainclothes detective unit] were carefully selected from qualified officers of the uniformed force . . . Personnel were assigned from there to various patrols throughout the state . . . Pages 119-120

One is hard pressed to identify another state which authorized the comprehensive administrative authority as that accorded the Superintendent. Page 31

The State Police, in a symbolic sense, have always been the police department of the state's chief executive, the Governor. Page 158

APPENDIX C

Excerpts From Rules and Regulations to the Conduct, Government of the Division of State Police and the Members Thereof (1969)

A Certified Copy of the Entirety, Obtained From the Archives of the Rhode Island Secretary of State, On File With the Clerk of the Court

When necessary to take police action while in civilian clothes, the Trooper will first announce himself as a State Police officer, and will show his badge if necessary. *A civilian is not expected to recognize the authority of a policeman in plain clothes* . . . Conduct and Courtesy, p. 20 (emphasis added)

The right to command and seniority shall be in accordance with the regulations of the United States Army. Dept. Reg., p. 4

Never stand at ease when on duty in uniform, except the military "at ease" (feet firmly placed apart; hands behind back). Conduct and Courtesy, p. 17

As long as a man is a member of the State Police *he is marked as such*, and the public is quick to criticise him if given any grounds to do so. Conduct and Courtesy, p. 16 (emphasis added)

"Don't Talk". (This is the first rule of this department) Conduct and Courtesy, p. 16

Non-official conversation with civilians by Troopers on duty in uniform gives the public the bad impression of inattention to duty, and will be limited to the minimum consistent with courtesy. Conduct and Courtesy, p. 16

APPENDIX D
THE TROOPER UNIFORM

Excerpts From Rules and Regulations to the Conduct, Government of the Division of State Police and the Members Thereof (1969)

A Certified Copy of the Entirety, Obtained From the Archives of the Rhode Island Secretary of State, On File With the Clerk of the Court

DEPARTMENT UNIFORM REGULATION, Page 32, *et. seq.*

. . . the basic uniform of members of the Rhode Island State Police shall consist of the items and articles described below, *from which the uniform of the day will be prescribed as occasion demands*, together with such additional accessories and equipment *as the Superintendent may* hereafter adopt and *prescribe*. (emphasis added)

HEADWEAR:

(a) HAT: Trooper style, with high crown. Dual eyelets on each side of crown, eyelets in brim and one eyelet in front center of crown 1¾" above band. Narrow brown leather chin strap. ⅞" "Hickory" color cloth band.

(c) HAT BADGE AND BADGE BACK: Triangular, highly polished brass badge, 1⅝" wide, 1¾" high, anchor engraved in center, with the word "HOPE" thereon. Also, equally engraved along the edge of the lower half of the badge, the words "IN THE SERVICE OF THE STATE."

Triangular cordovan leather back for badge, 2" wide at widest point, 2³⁄₁₆" high.

(Badge and badge back worn on both the trooper hat and service cap.)

TAILORED UNIFORM:

TRIM: Whenever the word "trim" is used, it shall mean a ¾" black material edged with pink doe skin.

EPAULETS: Whenever the word "epaulets" is used, it shall mean a military-styled epaulet of black cloth material, with a stiffener inside and edged with pink doe skin.

(a) TRAFFIC SHIRT: Military style shirt made of Oxford grey material, . . . "V" back, left and right box pleated pocket with lapel; elbow patch. To be duffed 5" from bottom of sleeve, with trim. Brass pocket buttons and black bone buttons down front of shirt. Shoulder epaulets sewed on at outer edge of shoulder and secured with brass button at neckline.

(b) OFFICERS SHIRT: Military style shirt made of grey gabardine . . . "V" Back, left and right box pleated pocket with lapel, 5" cuff, grey gaberdine shoulder epaulets, grey bone buttons.

(c) BLOUSE: Made of Bedford cloth, Oxford, . . . biswing back, flare skirt. Four buttons down front, top three brass, bottom black bone. Top right and left box pleated pocket with lapel and black bone button. Bottom left and right inside pockets with button-down flap. Black bone button on pockets. To be cuffed 4½" from bottom of sleeve with trim.

(d) BREECHES: Made of Bedford cloth, Oxford, Style #776 (Wanskuck), butterfly peg, two side pockets, two hip pockets, two blackjack pockets below the hip pockets and watch pocket. Trim sewed along the outside edge of the breeches from the belt loop to a point 4" from the bottom of the breeches. An 11" zipper on the inside of each leg of breeches, from a point just below the knee to bottom of breeches.

(e) DRESS COAT: Military style, made of black overcoating material, . . . Double-breasted, pleated back, half belt with two brass buttons. Double row of brass buttons down front.

Two inside pockets, with lapel. Gun loop on left side to hold gun holster. To be cuffed 4½" from bottom of sleeve, with trim. Shoulder epaulet. Coat to be lined with Bedford cloth . . .

(f) SERVICE BARS: Service bars 1½" x ¼", made of pink doe skin, on black material, ½" above cuff on left sleeve. Each bar represents completed enlistment of three years. Worn on traffic shirt, blouse and dress coat only.

(g) CHEVRONS: Sergeant and Corporal chevrons made of pink doe skin ½" wide and 3" from the apex on black material worn on both sleeves 4¾" from top of sleeve.

Chevrons worn on traffic shirt, blouse and dress coat only.

(h) TROOPERS NUMBER PAD: Pad made of black cloth material with stiffner (sic) inside, 2¾" x 1⅝", trimmed with pink doe skin on top and bottom. Worn on traffic shirt, blouse over left top pocket; on dress coat over left breast. Troopers brass numerals ⅞" x ⅝" worn on badge pad.

(i) SERVICE RIBBON: Made of artillery red ribbed silk ribbon, with two vertical black bars, 1⅝" x ½", worn on blouse and traffic shirt only.

(j) TRAFFIC BELT: Made of white webbing, 2" wide, worn so as to form an "X" on front and back.

(k) LANYARD AND WHISTLE CORD: Made from black nylon cord. Lanyard worn looped from shoulder epaulet around right shoulder and fastened on a swivel snap at gun butt. Whistle cord fastened at left shoulder epaulet and tied to whistle.

(l) NECKTIE: Black silk or gabardine four-in-hand tie.

FOOTWEAR:

(a) BOOTS: Officers Field Boots, knee length, leather dress boot, Color . . . brown . . .

(b) SHOES: Blucher, cordovan leather oxford, Style approved by the Superintendent.

LEATHER EQUIPMENT:

(a) LEATHER COAT: Made of black forequarter horsehide leather with tail-split. Sheepskin or mouton collar; collar backed with forequarter horsehide leather. Coat lined with 33-ounce Melton, black or oxford; leather shoulder epaulets. Two inside pockets, with flap. 5" overlap in front of coat, leather belt loops. Brass buttons used throughout.

A brass, arc-shaped emblem with an anchor engraved in center and the words "STATE POLICE" embossed equally on sides of the anchor, fastened to an arc-shaped piece of cordovan leather, stitches where the upper part of the sleeve meets the shoulder opening. A 3½ x 2½ cordovan leather numberpad on left breast, with trooper's numerals.

(b) BELTS AND CASES: Sam Browne, Garrison and leather coat belts, custom-made of Cordovan leather, with brass buckles and loops. Holster, cuff cases and iron claw case custom-made of Cordovan leather.

(c) GAUNTLETS: Five-finger, black leather summer gauntlet, with a 5" x 7" genuine leather cuff.

(d) ARM PAD: Arm pad custom-made of cordovan leather 4½" x 3½", with a 17" x ⅝" cordovan strap secured to center of pad. Pad to be so constructed as to allow for the inserting and removing of stolen car list.

SUMMER UNIFORM

2. Hereafter when the Executive Officer, because of extremely hot weather, designates summer uniform to be worn as the uniform of the day, it will mean the following:

Trooper hat; grey, lightweight tropical worsted shirt and slacks; and Oxford shoes, with the exception of cycle duty.

SUMMER UNIFORM

1. Ties shall be worn with the Summer Uniform in court, at funerals and on such other assignments where proper respect should be shown.

UNIFORM, P. 27, et. seq.:

State Police Service Ribbon:

Description: Artillery red ribbed-silk ribbon, with two vertical black bars . . .

How Worn: The Service Ribbon, when authorized, will be worn on the blouse and on the woolen shirt . . .

Members of the State Police will not appear in public in semi-uniform. Either they will be in uniform or they will be in civilian clothes.

Arm Pads:

(a) To be worn at all times by all men on patrol. The armpad will not be fastened to the car or motor cycles.

. . . 10. LANYARD: Worn around the right shoulder. Adjust the knot well up under arm to avoid Lanyard slipping off shoulder. Lanyard to be no longer than is necessary when worn with leather coat. Black silk cord.

11. WHISTLE CORD: Attached to left shoulder strap. Black silk cord.

IRON CLAW AND HANDCUFFS:

1. The iron claw and handcuffs will be worn as follows:

(a) *Summer Uniform:* Iron Claw in case on right side of breeches belt. Handcuffs in case on left side of belt, rear of revolver.

(b) *Blouse with Sam Browne Belt:* Iron claw in case on right side of belt. Handcuffs in case on right side in rear of claw.

UNIFORM, "Uniform Regulations," Page 38, Paragraph 10:

DEPARTMENT FELT HATS: The approved Department felt hat shall be known as the "Rhode Island State Police 'Trooper Hat'"

1. The "Trooper Hat" shall be worn for *all*[1] types of uniform duty except when patrolling on cycles.

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[1] (emphasis added)

2. Hats to be worn in such a manner that they will appear to be down at a slight angle just over the right eye.

3. *CARE OF THE HAT:*

(a) Brim to be retained in original position and under no circumstances (sic) to be rolled.

(e) The hat badge has been gold dipped and will not need any polishing. Simply wipe off with a clean cloth. Do not use any type of polish as it is unnecessary and will cause felt to become soiled in area around badge.

(g) The chin strap is placed in the hat by starting the leather piece down through the left side of the brim and up through the right side. The buckle is then centered under the badge, and then the strap is fitted to the back of the head. After this fitting has been effected, the strap is cut neatly so as to leave 2½ inches remaining from edge to buckle.

JOINT

APPENDIX

No. 84-1606

In The
Supreme Court of the United States
October Term, 1984

TERRANCE HOLBROOK AND JOHN MORAN,
Petitioners,

v.

CHARLES FLYNN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES:

Relevant items have been reproduced in the Appendix to the Petition for Certiorari as indicated.

Rhode Island Supreme Court

Apr. 16, 1976—Petition for certiorari filed [pre-trial]

Apr. 20, 1976—Petition for certiorari denied

Apr. 21, 1976—Motion to reargue filed

Apr. 27, 1976—Motion to reargue granted; denial of certiorari vacated; petition granted and remanded with instructions [Pet. App. F]

Oct. 7, 1980—Heard on defendants-appellants' direct appeal

July 31, 1980—Appeal denied and dismissed. Opinion filed. [Pet. App. C]

Aug. 13, 1980—Petition for rehearing denied

United States District Court (D.R.I.)

Aug. 30, 1980—Petition for habeas transferred from D. Mass.

Feb. 24, 1984—Petition denied and dismissed [Pet. App. B]

Mar. 20, 1984—Petitioner's notice of appeal filed

United States Court of Appeals (1st Cir.)

Dec. 7, 1984—Judgment enters vacating decision of Dist. Ct. Remand to Dist. Ct. with instruction to issue writ of habeas corpus. [Pet. App. D] Opinion filed. [Pet. App. A]

Jan. 11, 1985—Appellees' petition for rehearing denied [Pet. App. E]

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28 U.S.C. § 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

R.I. Const., Art. 1, § 9. Right to bail—Habeas corpus. —All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by death or by imprisonment for like, when the proof of guilt is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety shall require it; nor ever without the authority of general assembly.

R.I. Gen. L. § 10-9-32. Judicial power to bring in criminal defendants and witnesses.—Nothing contained in this chapter shall be so construed as to restrain the power of any court to issue a writ of habeas corpus, whenever necessary to bring before them any prisoner for trial, in any criminal case lawfully pending in the same court, or to bring in any prisoner to be examined as a witness in any suit or proceeding, civil or criminal, pending in such court. whenever they shall think the personal attendance and examination of the witness necessary for the attainment of justice.

R.I. Gen. L. § 42-56-3. Transfer of function from the department of social and rehabilitative services.—There are hereby transferred to the director of the department of corrections:

(a) All functions of the division of correctional services formerly of the department of social and rehabilitative services, including the administration of interstate compacts and all other officers, employees, agencies, advisory councils, committees or commissions of said division of correctional services.

(b) Those functions of the department of social and rehabilitative services which were administered through

or with respect to the division of correctional services to include generally and specifically, the correctional institutions, the probation services and other similar functions.

(c) So much of other functions or parts of functions of the director of the department of social and rehabilitative services as is incidental to or necessary for the performance of the functions transferred by this section.

(d) All functions and duties of the committing squad formerly of the sheriff's departments of the various counties of the state, who shall hereafter be designated as "Rhode Island state marshals"; senior committing officers shall be known as senior deputy marshals; all other committing officers shall be known as deputy marshals.

(e) All functions and duties of the Rhode Island state marshals are as follows:

(1) To be responsible for the custody and safety of prisoners when transporting them to and from court sessions.

(2) To supervise the conduct of, and maintain order and discipline among prisoners.

(3) To have custody of prisoners while detained in a courthouse, and during the court's hearing of their cases.

(4) To transport prisoners from the courts to the designated place of detention.

(5) Upon request of the director of corrections, or his designee, to transport prisoners to and from such medical facilities as are necessary and proper to render treatment to said prisoners.

(6) Upon request of the director of corrections, or his designee, to transport and escort prisoners while on furlough as required in acccordance with the provisions of § 42-56-18.

(7) To be responsible for the safety and welfare of prisoners in custody.

(8) To carry firearms as prescribed.

(9) The members of the committing squad shall have the powers of sheriffs and deputy sheriffs.

AMICUS CURIAE

BRIEF

No. 84-1606

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

TERRANCE HOLBROOK AND JOHN MORAN,

Petitioners,

v.

CHARLES FLYNN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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STATUTES

QUESTION PRESENTED

Was the defendant in this case, respondent herein, denied a fair trial by the mere presence in the courtroom of four armed, uniformed policemen who were assigned to maintain courtroom security?

No. 84-1606

IN THE SUPREME COURT

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OCTOBER TERM, 1984

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BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

Our courtrooms, eloquently characterized by Justice Black as "palladiums

of liberty," serve as an important bulwark of our democratic system of government. Experiences in other lands during this century have shown that we can remain free as a people only if our courts remain both independent and secure. To that end, each court is, and must be, granted the inherent power to maintain its physical integrity. Each sitting judge must decide whether, and to what extent, security measures are necessary to maintain order and to protect the participants and spectators of this vital democratic process. The purpose of this brief is to distinguish the employment of guards, which occurred in this case, from the inherently more prejudicial use of shackles, to identify the criteria upon which courts may rely in determining the need for security, and to delineate the nature of the evidence which justifies the use of security

measures. Our interest in the resolution of these issues, which will affect literally every criminal trial in this nation, brings the People of the State of California before this Court as Amicus Curiae.

SUMMARY OF ARGUMENT

The Court of Appeals, using the general term "physical restraint," failed to recognize that there exist myriad forms of courtroom security. We argue that the presence of guards, even armed and uniformed, in the court simply cannot be equated with the use of shackles in terms of its potential impact upon the right to a fair trial. We argue further that the quantity and quality of criteria invoked to justify the use of courtroom security should correspond to the nature of that security. Finally, we argue that the hearing at which the trial court states

its reasons for the use of security may be informal, and that the rules of admissibility may be relaxed.

ARGUMENT

THE USE OF COURTROOM SECURITY IN THIS CASE DID NOT DENY RESPONDENT DUE PROCESS OF LAW.

A

It seems to have been the premise of the Court of Appeals that no constitutional difference exists among various forms of courtroom security. Using the general rubric of "physical restraint," the lower court effectively blurred all distinction between the presence of a few guards, on the one hand, and the use of shackles or manacles, on the other. See Flynn v. Holbrook, 749 F.2d 961, 963-966 (1st Cir. 1984). Several other courts have been similarly oblivious to this distinction: E.g., United States v. Gambina, 564 F.2d 22, 24 (8th Cir. 1977); United States v. Jackson, 549 F.2d

517, 526-527 (8th Cir.), cert. den., 430 U.S. 985 (1977). Other cases, however, recognize that the use of guards simply does not have the potential which is posed by shackles for impinging the right to a fair trial. Hardee v. Kuhlman, 581 F.2d 330, 332 (2d Cir. 1978); United States v. Clardy, 540 F.2d 439, 443 (9th Cir.), cert. den., 429 U.S. 963 (1976). In light of the reasons stated in the published decisions which condemn the use of shackles absent a particularized showing of cause, we think the presence of security personnel cannot be equated with the chaining of a criminal defendant.

Decisional law traditionally has cited five reasons why shackles should not be employed absent a showing of necessity: (1) they may prejudice the jury against the defendant and undercut the presumption of innocence; (2) they

may confuse and embarrass his mental facilities; (3) they may make communications difficult with his attorney; (4) they may cause physical pain; and (5) they detract from the dignity and decorum of the judicial process. See Illinois v. Allen, 397 U.S. 337, 344 (1970); Kennedy v. Cardwell, 487 F.2d 101, 105-106 (6th Cir. 1973); People v. Duran, 16 Cal.2d 282, 289-290, 545 P.2d 1322, 127 Cal.Rptr. 618 (1976); People v. Boose, 66 Ill. 261, 362 N.E.2d 303 (1977); Commonwealth v. Brown, 364 Mass. 471, 305 N.E.2d 830 (1974). It should be apparent that these rationales are largely or wholly inapplicable to the presence of guards in the courtroom.

First, as the defendant is not in physical restraint, he is in no pain and his mental faculties should not be abated in any way. Second, if the guards are so situated as to be unable to hear the

defendant and his attorney, the officers' presence should not fetter communications between counsel and the accused.

Third, the presence of guards, even armed and uniformed, simply cannot be compared to the use of manacles in terms of its impact on the dignity of the judicial process. Hardly a criminal trial occurs without the presence of a bailiff in the courtroom. Additional security would not create the aura of potential violence in the same way that shackles do. The spectre of a forcible confrontation can be further reduced by skillful placement of security personnel and the concealment of their weapons. At all events, the deployment of a reasonable number of guards does not create the oppressive, brutal atmosphere which the use of chains can engender.

Fourth, the introduction of security personnel cannot prejudice a jury against the accused as can the use of chains. Manacles send a signal of repressed violence to the jury; the shackled defendant is dangerous. If he has such propensities, perhaps he committed the crime with which he is charged. By contrast, the use of guards does not place upon the defendant the insistent focus created by chains. The officers could be in the courtroom to protect the accused from death threats, for example. As stated in the preceding paragraph, guards and their weapons can be hidden; chains are often difficult to obscure.

Thus, the general rubric of courtroom security should not obliterate the constitutional distinctions among its various forms. The use of guards, being inherently less intrusive and prejudicial

than the use of chains, should call for correspondingly less justification. Indeed, if the officers and their weapons can be hidden completely from the jury, we fail to see why any justification is necessary. It is only when guards are uniformed or their weapons are exposed that the trial court must place reasons on the record for their presence. We now turn to the nature of the reasons which justify the deployment of security personnel in the courtroom.

B

The shackling cases teach that the use of physical restraints is constitutionally permissible to prevent escape (Patterson v. Estelle, 494 F.2d 37, 38 (5th Cir.), cert. den., 419 U.S. 871 (1974); Kennedy v. Cardwell, supra, 487 F.2d at 111; People v. Condley, 69 Cal.App.3d 999, 1006, 135 Cal.Rptr. 515 (1979); State v. Moen, 94 Idaho 477,

491 F.2d 858, 861 (1971); State v. Johnson, 499 S.W.2d 371, 374 (Mo. 1973)); to prevent violence (United States ex rel. Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir. 1973); Tunget v. Commonwealth, 303 Ky. 834, 198 S.W.2d 785, 786 (1946); Morris v. State, 382 S.W.2d 259, 260-261 (Tex. Crim. 1964)); or to forestall disruption of the courtroom proceedings through abusive language or unruly conduct. Illinois v. Allen, supra, MaGee v. Nelson, 455 F.2d 275, 276 (9th Cir. 1972); People v. Rogers, 187 Colo. 128, 528 P.2d 1309 (1974); People v. Boudoin, 257 La. 583, 243 So.2d 265, 268 (1971); People v. Palermo, 32 N.Y.2d 222, 225-226, 298 N.E.2d 61, 344 N.Y.S.2d 874 (1973).

In determining whether restraints are necessary to prevent such conduct, courts have relied upon the following considerations: (1) the number and

nature of the defendant's previous offenses (Odell v. Hudspeth, 189 F.2d 300, 302 (10th Cir. 1951); People v. Burwell, 44 Cal.2d 16, 33, 279 P.2d 744, cert. den., 349 U.S. 936 (1955); State v. Daniel, 297 So.2d 417, 418 (1974), aff'd, Daniel v. Louisiana, 420 U.S. 31 (1975); (2) the seriousness of the instant charges (see Kennedy v. Cardwell, supra, 487 F.2d at 110; State v. Stewart, 276 N.W.2d 51, 62 (Minn. 1979)); (3) the defendant's propensity for escape (Clark v. State, 280 Ala. 493, 195 So.2d 786 (1967); Martin v. State, 51 Ala.App. 405, 286 So.2d 80 (1973); People v. Burwell, supra; State v. Moen, supra; Tunget v. Commonwealth, supra; Commonwealth v. Chase, 350 Mass. 738, 217 N.E.2d 195 (1966)); (4) threats of violence toward persons in the court or otherwise connected with the trial (People v. Kimball, 5 Cal.2d 608, 611,

55 P.2d 491 (1936); People v. Zatko, 80 Cal.App.3d 534, 550-551, 145 Cal.Rptr. 643 (1978); State v. Stewart, supra); (5) shouting or other obstreperous conduct, making conduct of the trial difficult or impossible (Illinois v. Allen, supra; People v. Hillery, 65 Cal.2d 795, 806, 423 P.2d 208, 56 Cal.Rptr. 280 (1967); People v. Rogers, supra; People v. Boudoin, supra); (6) the presence of multiple defendants, already in custody and charged with serious crimes, a combination of factors which provide a strong motive for an escape attempt. See People v. Duran, supra, 16 Cal.3d 282, 289 n. 7, 545 P.2d 1322, 127 Cal.Rptr. 618 (1976); People v. Chacon, 69 Cal.2d 765, 778, 447 P.2d 106, 73 Cal.Rptr. 10 (1968); State v. Moen, supra.

Given that the purpose for courtroom guards is similar to the reason for the

use of shackles, it follows that the criteria which justify their use should also be similar. But, as we emphasized in the first argument, since guards are much less intrusive or prejudicial than chains, the presence of criteria to validate the presence of guards may be less numerous quantitatively and less compelling qualitatively. Furthermore, we submit that there should be a sliding scale which corresponds between the amount of restraint and its corresponding justification. Thus, at the lower end of the scale, there need be no justification for plain-clothed, unarmed guards who cannot be identified by jurors. At the upper end, a compelling showing must be made to permit the use of handcuffs, belly chains, and gags.

In the present case, the trial court authorized the use of four armed guards.

We believe that their presence was much closer to the lower than the upper end of the scale, and the justification for that presence may be accordingly less compelling.

C

Finally, we consider the nature of the hearing and the quality of the evidence which will justify the use of courtroom security. Although it is the trial judge "who is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes" (United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970); Woodards v. Cardwell, 430 F.2d 978, 982 (6th Cir. 1970)), we acknowledge that he should provide the accused with an opportunity

to be heard. Such a hearing, followed by findings of fact, serves the dual function of according fundamental fairness to the accused and providing a court of review with an adequate record to assess meaningfully any challenge to the use of security. See People v. Duran, supra; State v. Moen, supra; People v. Boose, supra; Commonwealth v. Brown, supra, 364 Mass. 471, 305 N.E.2d 830, 836 (1973); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353, 368 (1976).

Decisional law has relaxed the conventional rules of admissibility of the evidence, holding that the judge may rely upon information from official records and law enforcement authorities. United States v. Theriault, 531 F.2d 281, 285 (5th Cir. 1976); United States v. Samuel, supra; State v. Tolley, supra. We do not believe that this sensible procedure runs afoul of the

Confrontation Clause of the Sixth Amendment. Although the Confrontation Clause gives to the accused the right to be confronted by witnesses against him on the issue of guilt vel non (e.g., Pointer v. Texas, 380 U.S. 400 (1965)), the protections guaranteed by that provision do not apply to situations in which guilt or innocence are not directly in issue. Cf. McCray v. Illinois, 386 U.S. 300 (1967); Wolff v. McDonnell, 418 U.S. 539, 567 (1974). Furthermore, the safety of confidential informants could be jeopardized by a rule requiring in-court testimony rather than the use of documentary evidence. Cf. Wolff v. McDonnell, supra. Providing the accused with the opportunity to challenge at a hearing the information which is used to justify the fact and extent of security should be adequate to assure the reliability of the fact-finding process.

Finally, it should be noted that a hearing is not necessary on the nature of the charges, the nature of the prior convictions, and the conduct of the accused in the court's presence. See Kennedy v. Cardwell, supra, 487 F.2d at 110. The court relying upon these factors need only state its reliance on the record to permit adequate appellate review.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the First Circuit should be reversed.

DATED:

JOHN K. VAN DE KAMP,
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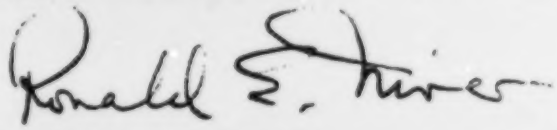

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Deputy Attorney General

CERTIFICATE OF SERVICE BY MAIL

TERRANCE HOLBROOK and JOHN MORAN,	)	
Petitioners,	)	
vs.	)	
	)	No. 84-1606
CHARLES FLYNN,	)	
Respondent.	)	

RONALD E. NIVER, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on August 26, 1985, he served true copies of the attached Brief for the People of the State of California as Amicus Cruiae in the above-entitled matter on counsel for respondent and

petitioners by placing same in envelopes addressed as follows:

Barry P. Wilson
59 Temple Place
Boston, Mass.
Attorney for Respondent

Arlene Violet
Attorney General of the
State of Rhode Island
72 Pine Street
Providence, RI 02903
Attorney for Petitioners

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

Ronald E. Niver

RONALD E. NIVER
Deputy Attorney General